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No. 1883

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA (Complainant),
Appellant,

vs.

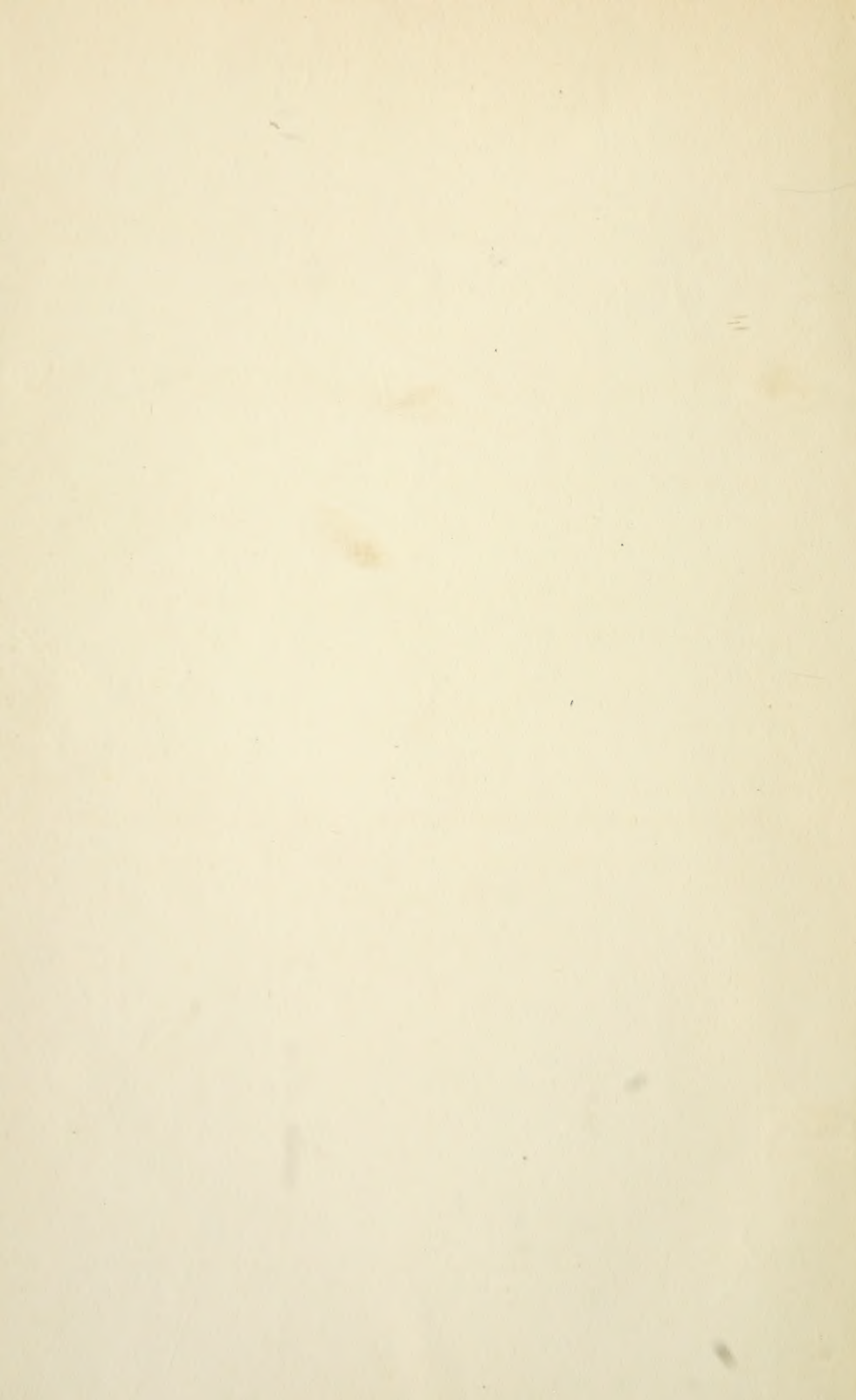
THE BARBER LUMBER COMPANY (a Corporation),
(Defendant), Appellee.

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Upon Appeal from the United States Circuit Court
for the District of Idaho, Central
Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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7. 18
No. 1883

IN THE
**United States Circuit Court of Appeals,
For the Ninth Circuit.**
FEBRUARY TERM, 1911.

The United States of America, Complainant, Appellant,
vs.

Barber Lumber Company [a Corporation],

James T. Barber, Sumner G. Moon, William Sweet,
John Kinkaid, Louis M. Pritchard, Patrick H.
Downs, Albert E. Palmer, and Horace S. Rand.

Defendants.

Barber Lumber Company,

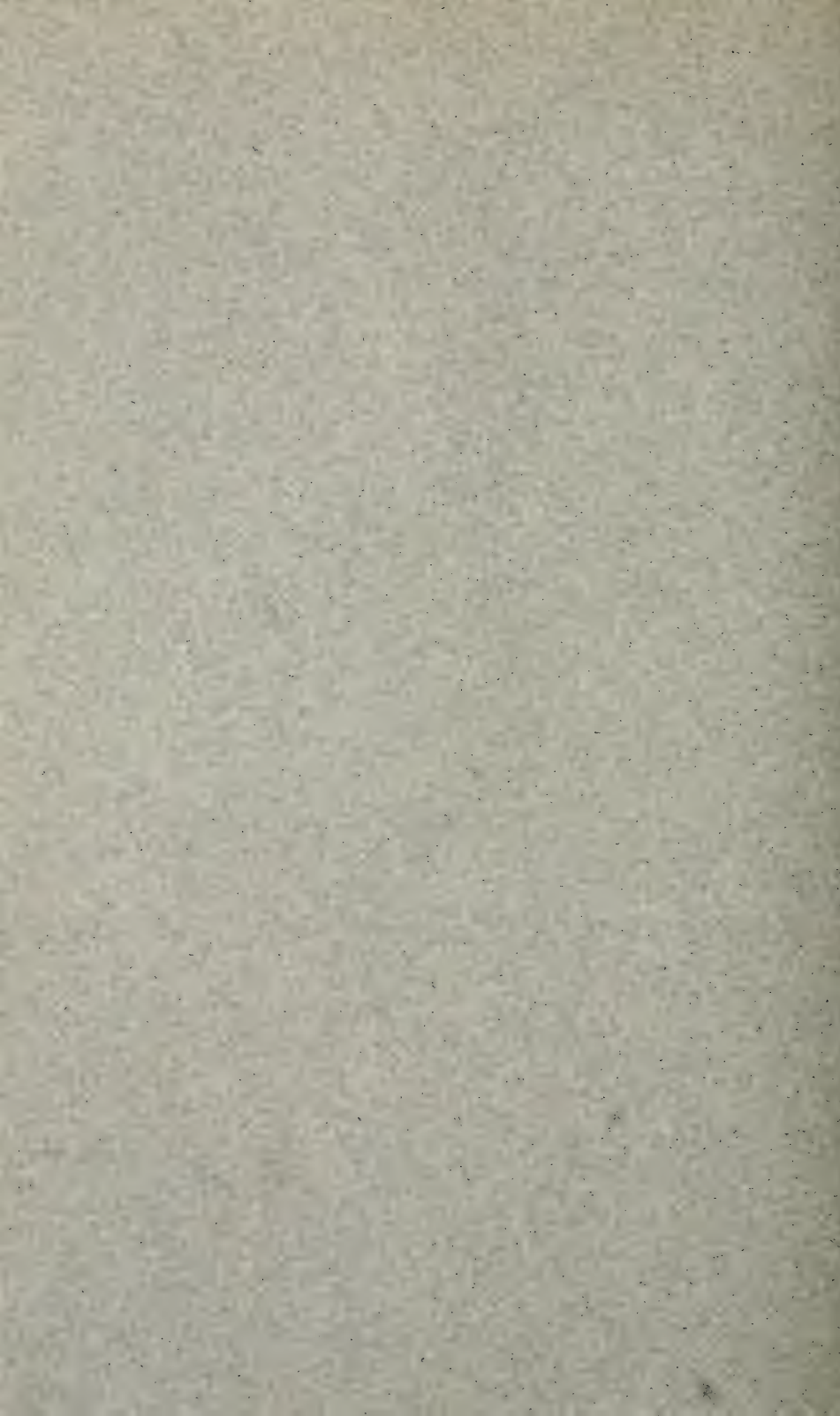
Appellee.

*Appeal from the United States Circuit Court
of the District of Idaho, Central
Division.*

Brief on Behalf of the United States.

FILED

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IN THE
**United States Circuit Court of Appeals,
For the Ninth Circuit**

THE UNITED STATES OF AMERICA,
Complainant, Appellant,
vs.

BARBER LUMBER COMPANY (a Corporation),
JAMES T. BARBER, SUMNER G. MOON,
WILLIAM SWEET, JOHN KINKAID,
LOUIS M. PRITCHARD, PATRICK H.
DOWNS, ALBERT E. PALMER, and HOR-
ACE S. RAND,
Defendants.

BARBER LUMBER COMPANY,
Appellee.

Brief in Behalf of Appellant

STATEMENT OF CASE.

Between September 1901 and October 1903, about sixty thousand acres of Government timber lands in Boise County, Idaho, bearing upwards of six hundred million feet of pine and fir timber (p. 4398, 4745-6) were entered under the Timber & Stone Act of June 3d, 1878, (7 Fed. Stat. 300), and transferred by the entrymen, practically as fast as their entries were

completed, to temporary "custodians" or trustees, designated by the defendants, who subsequently conveyed them, on the defendants' request, to the defendant corporation, which the individual defendants organized for the purpose of taking and holding the same.

This suit is brought to cancel the patents issued for 33,920 acres of these lands, and to recover the lands, on the ground that the titles were obtained from the Government by means of an agreement, or conspiracy, between defendants and certain other persons, and a concerted course of action thereunder, whereby the legal title was obtained through numerous entrymen who were procured by the defendants and their agents to file applications for the land, and ostensibly to comply with the provisions of the Timber and Stone Act, while, in reality, such entries were not made by the entrymen "in good faith to appropriate them to their own exclusive use and benefit," as required by the Act, but were made for the use and benefit of the defendants, and under agreements or understandings that the entrymen should transfer the titles, when so acquired, precisely as they did transfer them, to the defendants, or to persons whom they might designate.

The Bill charges, in effect, that the defendants procured the transfer of the legal title to this very considerable portion of the public domain, from the Government, and ultimately to themselves and their corporation, through the familiar device of "dummy entrymen," in violation of the governmental policy

with respect to the public lands, and contrary to the letter as well as the spirit of the Timber and Stone Act.

The acquisition of these lands by the defendants was the result of an agreement entered into in March, 1902, which was somewhat widened in scope as time went on, (4398-4465)—between Wm. Sweet and the late Ex-Governor Frank Steunenberg, of Idaho, and Messrs. Barber and Moon of Eau Claire, Wisconsin.

Barber and Moon had long been extensively engaged, and widely known, in the timber and lumber business in Wisconsin and elsewhere. Their various connections with men and companies of wealth and influence, interested in timber, are explained at some length by Mr. Barber in his testimony. (4356-62).

Like many other lumber-men in the Eastern and Middle States, they had, for some time before 1902, been seeking favorable opportunities to buy large tracts of timber in the West. (4360).

A. E. Palmer, then living in Spokane, had previously been associated in business, for many years, with Barber and Moon, in the North Western Lumber Co. of Wisconsin. He was a lumber man of sagacity and experience and they had implicit confidence in him (4360).

On Palmer's removal to Spokane, Barber & Moon had authorized him to report to them any good tim-

ber propositions which he might run across (4361).

William Sweet, a miner, mining promoter and speculator, living at Boise, and a client and bosom friend of John Kinkaid of that place (4241), and Steunenberg, who had formerly been Governor of Idaho, became interested, in the late fall of 1901 or early in 1902, in what they describe in the instruments hereafter referred to, as "the enterprise and venture of exploring and obtaining title to timber lands in the Boise Basin, Idaho."

In January, 1902, Steunenberg had applied to his friend, Amasa B. Campbell, of Spokane, to help him borrow \$15,000, explaining to him the nature of the enterprise, and proposing to Campbell to join himself and Sweet in it, and to help them raise \$100,000 or more to develop it. (3850-3854).

At Campbell's request Steunenberg prepared a full detailed report or prospectus, showing "the number of acres, and the timber, and the chances about the matter," (3850) and mailed it to Campbell in a pasteboard mailing tube, (3859) Feb. 2, 1902.

Campbell describes this Report as a document of ten or twelve pages, written out by Steunenberg in his own hand writing. (3851).

Campbell being, as he says, "pretty well loaded up," had some doubts about undertaking this additional investment, flattering as it seemed, but he wrote Steunenberg that he would do so under certain conditions (p. 3853-5).

In the meantime, and apparently about February

20, 1902, Mr. Palmer happened to be in Mr. Campbell's office, to enquire about some Coeur d'Alene timber, and in the course of conversation Campbell showed him (in confidence 4368) Steunenberg's report. (3851).

Palmer read the Steunenberg Report, and asked Campbell if he might send it "to his people in Wisconsin," to which Campbell assented, and Feb. 21st, 1902, Palmer sent the "Report" to Barber and Moon, saying "the Report explains itself." And "Mr. Campbell gave me this in confidence." (4368).

Barber, immediately on receiving and examining this Report, wired Palmer to have Steunenberg come to Eau Claire at their expense. (4370).

In the nature of things it is reasonable to suppose that this detailed "Report" of the "Enterprise," prepared with such pains by Steunenberg, for the confidential enlightenment of his friend, Campbell, whose assistance he was trying to enlist, must have enumerated, in the course of its ten or twelve pages the description and timber estimates of the lands already acquired by Sweet and himself, and of those which they proposed to acquire, and it can hardly be doubted that something of the organization and modus operandi by which they had already acquired some, and expected to acquire the remainder of these Government timber lands, (on which but few entries had then been made) and something with regard to the functions and efficiency of the lieutenants, Wells,

Downs, Kinkaid, Pritchard and perhaps Dean West and Nelson, through whom the practical work of exploring and obtaining title to the lands had been carried on, and through whom it continued to be carried on to the end, must have been set forth in this detailed report, which "explained 'itself,' and impressed all of these shrewd captains of industry, at first glance, with what Barber describes as the "fascinating" character of the proposition. (4381).

The importance, as well as the "confidential" character of this document and its contents is evidenced by Steunenberg's solicitude lest it might have miscarried in the mails, when Campbell failed for several days to acknowledge its receipt, (3859) and the fullness with which it described the whole project, and explained the grounds for his confidence of securing the entire tract, is evidenced by the fact that, on its perusal, Barber telegraphed at once to have Steunenberg come to Eau Claire at his expense. (4370).

Unfortunately, this illuminating document, which would, in the nature of things, and beyond any reasonable doubt, have given this Court, in compact form, much of the information which, without it, requires a tedious examination of the great mass of evidence, oral and documentary throughout this voluminous record, was not forth-coming. Messrs. Barber and Moon, into whose hands it was thus delivered, could not recall what disposition they made of it after the Eau Claire conference of March, 1902, at which, with Steunenberg's verbal explanations, it

accomplished so much, and brought such new life and development to the modest "enterprise and venture" which had then reached the limit of Sweet and Steunenberg's financial capacity.

The Steunenberg Report reached Eau Claire, Feb. 24, 1902. Steunenberg himself arrived there March 5th and, after two days of conference, went to Chicago March 7th, to meet his partner, Sweet, and secure his consent to the program which had been evolved at Eau Claire.

On the following day, March 8th, Barber wrote to Palmer, "In the last twenty-four hours our suspicions have been aroused that other parties are attempting to forestall Gov. Steunenberg in obtaining the timber in the Boise Basin, and in order to protect him and possibly handle the situation ourselves, we have been trying to do business by telegraph. * * *

"We have heard nothing from the Governor, who went to Chicago to meet his partner, Mr. Sweet." (4385-6).

We think the "business done by telegraph" by Barber and Moon, and its results, will very soon appear.

In the meantime, however, besides much telegraphic correspondence with Palmer about ascertaining the log driving capacity of Grime's Creek and Moore's Creek, (4381-5) and engaging Palmer to "serve as Treasurer for a corporation to develop Steunenberg's scheme." (4379). Barber telegraphed Steunenberg in Chicago, March 10, "When will you be here, we advise prompt action." (4386)

Steunenberg returned to Eau Claire, and on March 12th, a contract or agreement, predicated on certain representations of fact made by Steunenberg, was drawn up and executed in duplicate. (4387-96)

This agreement recited that Sweet and Steunenberg had previously entered into, and were then engaged in "the enterprise and venture of exploring and obtaining title to timber lands," on Grimes Creek and Moore's Creek in the Boise Basin, and that Sweet "had advanced in furthering such enterprise and venture" about \$22,000, and it then provided that, in the event that Barber and Moon shall "purchase and acquire Sweet's interest in the enterprise aforesaid, and pay him therefor the amount of his actual investment, with 50% profit added, Steunenberg can and will acquire and have vested in Barber and Moon, (for the mutual benefit of Steunenberg and themselves, in the proportions of three-fourths to Barber and Moon and one-fourth to Steunenberg) within six months from date, 25000 acres of land, bearing at least 200 million feet of pine and fir timber, (at least 80% of it pine), in substantially compact form, along and adjacent to said Grime's Creek and Moore's Creek, and so situate as to be available for use in manufacture into lumber, at a total cost of not to exceed \$140,000, and Barber and Moon, on their part, agree to buy and pay for the Sweet "interest in the enterprise" at the price named, and to furnish the money for buying the remainder of the 25,000 acres, at a price not to exceed \$6.50 per acre, in any in-

stance, and not to exceed \$140,000 for the whole 25,000 acres.

Other provisions of this agreement will require consideration hereafter, but it is sufficient now to say that the copy signed by Barber and Moon was sent by them to Palmer, March 13, 1902, with instructions to verify the representations made by Steunenberg, some of which were recited in the agreement, and some made orally and set forth in the letter of instructions to Palmer (p. 4414).

When all of these representations should be verified by Palmer, and he should become satisfied on all the points mentioned in the contract, and in the letter of instructions, Palmer was instructed to report to Barber and Moon the actual amount of Sweet's investment, for which, with the 50% profit, they undertook to provide the funds.

This letter of instructions does not, in terms, direct Palmer to deliver the signed copy of the agreement to Steunenberg, and it might be inferred from the tenor of the letter that the agreement had already been mutually delivered, as well as executed; but Barber and Moon both testify (4378) that the agreement was not to be delivered or become operative, until Steunenberg's representations, on all points, had been fully verified by Palmer.

One of the representations to be verified by Palmer, or perhaps, more properly speaking, a condition precedent to be required and insisted on by Palmer before the delivery of the signed copy of the agreement to Steunenberg, and the payment of the

agreed purchase price for Sweet's interest in the enterprise, is stated in this letter of March 13th, and in a subsequent letter to Palmer, prepared by Mr. Frawley, one of Barber and Moon's attorneys at Eau Claire (4432-4), viz., That Sweet shall have "title in him of 6400 acres, and title practically perfected to substantially 5000 acres more." (4417).

The Frawley letter (April 7, 1902) says (4433)

"Mr. Steunenberg represents that final
 "proofs have been made in about 6400 acres,
 "and final receipts issued therefor, and that
 "final proofs were about ready in from 4600
 "to 5000 acres in addition thereto, and that
 "final receipts would be issued therefor. * * *

"It was the understanding that when mat-
 "ters were in the conditions stated, that Mr.
 "Moon and Mr. Barber would buy out Mr.
 "Sweet, and pay him the amount to which he
 "was entitled under the contract, but at the
 "time of payment the title to all lands upon
 "which final proofs were made, and final re-
 "ceipts issued, should be vested in Mr. Barber
 "and Mr. Moon."

Sweet had initiated the enterprise and venture of exploring and obtaining title to these lands some weeks before Steunenberg joined him in it. (4242-4246).

The arrangement with the entrymen, under which Sweet acquired the titles, is given, in practically the same terms, by several of the witnesses, but it is no-

where stated more succinctly than by Mr. Bundy, the leading Counsel for the defense, in the Cross-examination of Albert Nugent at page 2674.

“Q. Don’t you remember that there was
 “a proposition to sell these claims for \$650, as
 “follows, Mr. Nugent; \$412.50 to be paid down
 “at the time, with which money you would
 “prove up, then \$137.50 more when the receipt
 “was issued—that would make \$550—then the
 “remaining \$100 to be paid when final receipt
 “or patent was issued, which made the \$650.
 “Now you were paid the \$412.50, with which
 “to prove up? A. Yes.

“Q. And you were paid \$137.50 when you
 “took the temporary receipt to Mr. Kinkaid?

“A. Yes, sir.

“Q. Still leaving the other \$100, which
 “you were to get when you got the final re-
 “ceipt, but no final receipt ever being issued,
 “you never got it?

“A. Yes, sir.

“Q. That was the arrangement, that the
 “price for the claim paid in these instalments,
 “was to amount to \$650? A. Yes, sir.”

Under this arrangement it is evident that 40 entries on which final proofs and payments had been made, would have cost Mr. Sweet, at \$550 each, \$22,000—and as each entry contained 160 acres, this would have given him title to 6400 acres.

On March 12th, 1902, however, only 87 applica-

tions had been filed in the Boise Basin. Twelve of these had been abandoned without final proofs or payments, and the time for such proofs and payments had expired.

Of the 75 remaining entries 24 are shown, by uncontradicted evidence, much of it from the defendants' own witnesses, and all of it corroborated by their documentary evidence, never to have been acquired by Sweet and Steunenberg, and not to have been acquired by the defendants until some years later.

This left 51 entries made prior to March 12th, which may have been controlled by Sweet and Steunenberg at that date, of which, however, only 35 had then proceeded to final proof and payment—and two of these entrywomen, Ida M. Briggs and Dora C. Burns, were threatening to file relinquishments of their claims, which they afterwards did. (,.

That the total number of entries which could possibly have been controlled by Sweet and Steunenberg March 12, 1902, was not more than 51, and that not more than 35 of these had, at that date, proceeded to final proof and payment, (2 of which, were the Dora C. Burns and Ida M. Briggs entries, afterwards relinquished, and the money withdrawn from the land office,) is demonstrated at the pages of the evidence, oral and documentary, given opposite each entry, in Appendix A. And is conclusively corroborated by the list for taxation of all lands claimed by defendant, prepared by Steunenberg's direction in December, 1903 (p. 5196) and the list of

all titles secured by defendants down to June 28, 1904, prepared by Steunenberg and sent to Barber and Moon at that date, in response to several insistant requests for a complete and accurate account to date (p. 4622). All the titles which were held by Sweet and Steunenberg March 12, 1902, must certainly have been given in one or other of these lists. But only 49 of the entries filed before March 12, 1902, are found in either of these.

The maximum acreage of completed entries to which Sweet could possibly have held title March 12th, was, consequently, 35x160—5600 acres, instead of 6400; and the maximum of initiated entries, not completed by final proof, to which the title could have been “practically perfected” (viz. of course, by agreements that the entrymen would transfer them, on request, at the stipulated price) was 16x160—2560, instead of 5000; which left a total shortage of 3240 acres to be made up, in some manner, before the contract would be delivered, or the money paid.

To make good these conditions precedent to the delivery of the agreement, and the payment for Sweet’s interest, it was decided therefore, to have at least twenty new entries filed immediately, and to have final proofs and payments made on at least five of the sixteen entries on which only the initial papers had been filed.

This is precisely what was done, and until it was done, Barber and Moon, and Palmer, withheld the delivery of the signed contract to Steunenberg, and

the payment to Sweet of the purchase price for his interest in the "Enterprise."

Moreover, all of the Basin entries which had been filed up to that time were on Grimes Creek, in Townships 7 and 8, Range 5.

The Moore's Creek timber was all in Township 6, Range 6, and not a single entry, or application to purchase, had ever been filed on Moore's Creek, or in that Township (except one, filed by Charles W. Gardner, May 3, 1900, nearly two years before, and not in any way connected with this transaction).

The agreement of March 12 specifically provided for the securing to the defendants of all the desirable timber in that Moore's Creek Township, all of which was then un-entered Government land.

Under the Sweet regime, at the outset, and afterwards, under the Sweet and Steunenberg regime, the *modus operandi* had been for John I. Wells, a mining laborer and joint proprietor with his brother in a saloon at Centerville (until about December 1901, when he removed to Boise, more conveniently to carry out his part in the program), "rustle," to use his own expressive word, (4076) the entrymen, in squads, or parties, generally of three or four, making a comfortable wagon load, out to the timber in the Grimes Creek territory, which lay a few miles North and East of Centerville, and some of it near Placerville, where they would be met by Patrick H. Downs, a timber cruiser, who "located" them, generally giving to one of the party a list of their respective

quarter sections, on which they were to file, which they then carried back to Wells at Boise, whereupon either Wells or Pritchard (4020) prepared their filing papers (T & S. Sworn Statement, Non-Mineral affidavit, and notice for publication) and saw to having them properly filed.

In the work of organizing these "location" parties, "rustling" the entrymen, or, as Downs says "sending the people to him, looking after the business at the Boise end" (4010-11) Wells was frequently assisted by an old mining laborer named Dean West who had an extensive acquaintance with the class of "transients" () unemployed miners, barbers, hack drivers, paper hangers, livery-barn men, etc., etc., from whom many of the entrymen were recruited, and who secured quite a number of the entrymen. Another man of the same type, named Nelson, had rounded up one or two of the location parties. ().

The trip from Boise to the Grimes Creek timber was a matter of forty miles or more, and took at least two days. ().

The Moore's Creek timber lay North and East from Idaho City, about thirty-five miles from Boise, and the location trips to this timber, all of which occurred immediately after the execution, (and all but two before the delivery) of the March 12th agreement, occupied also at least two days.

Steunenberg was still in Eau Claire March 13th when he wrote to Campbell the letter given at page 3861. He could not have returned to Boise, therefore,

before March 16th or 17th.

On Monday, March 17th, Samuel C. Bowen, a particular friend of John Kinkaid, (who must have been "located" as early as Saturday or Sunday, March 15th or 16th, filed Application No. 328, for a 160 acre location on Grimes Creek in Sec. 17, T. 7 R. 5.

On Friday, March 21st, 1902, George H. Ensworth and Louis M. Pritchard (whose intimacy with Kinkaid and general participation in the "enterprise" appears at various points in the evidence) filed the initial applications Nos. 329 and 330 for timber locations on Moore's Creek, in Sections 19 and 20, Township 6, Range 6. They must have started from Boise on their "locating" trip, as early as Wednesday, March 19th.

Saturday, March 22d, Homer G. Allen, Ery A. Wilmot and Sam'l Marcum, who must have left Boise for Idaho City as early as March 20th, filed applications Nos. 331, 332 and 333 on Moore's Creek, in Sections 17, 7 and 8, respectively, T. 6, R. 6.

March 24th, Daniel P. Woodmore filed application No. 337 in the Grime's Creek timber in Section 35 T. 7 R. 5.

Tuesday March 25th, Geo. C. Gibson, Willis C. Lane, Wm. Judge and Sedgwick Hoover filed applications (numbered 338, 339-340 and 341) on Sections 21, 28, 7, 29, T. 6 R. 6.

Wednesday, March 26th, Frederick Thurman and his wife, Lola, John and Joseph French and Adella Brookhart, filed applications 342, 343, 344, 345 and

346, on timber lands in the Moore's Creek territory, in Sections 20 and 17, T. 6 R. 6.

Friday, March 28th, Charley Patterson, Edward E. Butler, Smith Barker and Wm. H. Lewin filed application 347, 348, 349 and 350 in the Moores Creek timber, in Sections 32 and 33 (2 locations in each). T. 6 R. 6.

Monday, March 31st, Jonathan Lippincott filed application No. 351 on Moore's Creek, in Sec. 30, 6, 6.

Friday, April 4th, Frank Lane filed application No. 354 in Sec. 35, T. 8, R. 5 in the Grimes Creek territory.

Saturday, April 5th, Walter S. Walker and Harry S. Worthman (another man whose connection with the "enterprise" is shown by the record) filed applications Nos. 352 and 353 in Secs. 31 and 29, T. 6, R. 6, in the Moore's Creek timber district.

All of these entrymen were "rustled" out to the timber by John I. Wells, or Dean West, and all were "located" by Pat Downs; their filing papers were prepared by Wells or Kinkaid, and

Each of these entries was transferred to A. E. Palmer, for the defendants, after the final proofs and payments were made and the Receiver's Receipts obtained.

While some of the deeds in evidence from the entrymen to Palmer bear later dates, the evidence, hereafter referred to, makes it practically certain that the Receiver's Receipts for at least 20 of these 24 entries were turned over to Pritchard and Kinkaid (for the defendants) as soon as the Final Proofs

were made, and 9 of these claims were conveyed by deed to Palmer during June and July, 1902, either on the day after, or within a very few days after, Final Proof in each case. (See Appendix A to this brief, and pages of the record there referred to).

Thus, within about three weeks from the date of the Eau Claire agreement, 3,360 acres of the Moore's Creek timber—on which no entries had ever been made, except the one in May 1900, above mentioned, and 480 acres more of the Grime's Creek timber, were "secured" to the "enterprise," and these entries—if made, as they evidently were, in the interest of the "enterprise"—being added to the 51 which may have been controlled by Sweet and Steunenberg on March 12th, made good the Steunenberg representation, and the condition precedent to the delivery of the agreement, and the payment for Sweet's interest, of "6,400 acres 'secured' and 5,000 acres more 'practically perfected,'" and this representation and condition precedent could not, on the evidence, have been made good, or complied with, in any other way.

The condition precedent, of "title to '6400 acres secured,' and to substantially 5000 acres more 'practically perfected,'" having been thus complied with, Palmer came over to Boise April 6th or 7th, and after communicating the situation to Barber and Moon and receiving their approval (p. 4426-30), and the further letter of instructions prepared by Mr. Frawley April 7th, again calling his attention to the conditions precedent which must be fulfilled before clos-

ing (pp. 4432-4), and "the wire to the same effect" (p. 4431), Palmer delivered the signed contract to Steunenberg April 10, 1902, and on the same day gave Steunenberg his personal check, drawn on his own bank in Spokane to the order of William Sweet, for \$32,925.00, the purchase price agreed on for Sweet's interest in the enterprise (p. 2860).

Palmer also gave Steunenberg at this time two other checks, one for \$5,800.00 and one for \$1,200.00.

These payments will require some special consideration hereafter.

It may be worth noting here that if Sweet had paid the full \$550.00 for each of the 40 completed entries required to make up the 6400 acres, title to which was required to be "secured," as one of the conditions precedent to the purchase of his interest, his investment would have been \$22,000.00, and the purchase price for his interest in the enterprise under the contract would have been \$33,000.00. But Homer Granger had only been paid \$500.00 instead of \$550.00 on account of his claim, and had still \$150.0 coming to him on the giving of his final deed, instead of the usual \$100.00 (p. 1441-4).

This made Sweet's investment \$21,950.00 instead of \$22,000.00, and made the purchase price (adding 50 per cent) \$32,925.00 instead of \$33,000.00.

Whether the extraordinary activity in the locating of these new entrymen in the virgin timber of the Moore's Creek territory, which followed so closely on the heels of the Eau Claire conference and

agreement, was due to vigorous measures taken by Steunenberg, or to the "business by telegraph" which Mr. Barber had "been trying to do" before writing Palmer the letter of March 8th (pp. 4385-6) does not appear; but whether these 24 entries were made on the initiative of Barber and Moon, or of Steunenberg, they were certainly made with the knowledge, approval and connivance of all parties to the March 12th agreement, and for the specific purpose of making this agreement operative, by supplying the lands which were lacking on March 12th, to comply with the "conditions" promised by Steunenberg; and Palmer waited patiently until these new entries were made before "closing the deal." (See 4704).

Mr. Barber says (p. 4791) "we forwarded the money to buy out Sweet just as we agreed to. He had bought the claims as he told us, and taken those final receipts."

Mr. Bundy says (4792) what he represented was that he had 6400 acres bought and paid for, and he also represented that he had 5000 under contract.

The only "contract" or communication with the entrymen who held these 5000 acres, on which final proof had not been made, must have been, on the evidence, at or before the making of their original entries, for nearly all of them swear that they did not see Wells and Kinkaid from that time until about the time of making their final proofs.

By the March 12th agreement Steunenberg was

made the partner and agent of Barber and Moon, and his acts and knowledge became theirs, at least from that time forward.

Barber's letter of March 8th to Palmer says they "had been trying to do business by telegraph" for the express purpose "of protecting Steunenberg against the possibility of anyone's forestalling him in obtaining this timber, and possibly of handling the situation themselves. None of the telegrams produced in evidence had any tendency to accomplish this result, but telegrams to Kinkaid, Wells, or Downs, whose connection with the locating of all the previous entries "secured" to the enterprise must, almost certainly, have been shown in the Steunenberg Report, would have been the most natural and certain way of protecting Steunenberg against the apprehended "forestalling" of his plans for obtaining this timber, and would naturally and easily account for the rapid recruiting, and "rustling" of these entrymen to the timber, which began before Steunenberg could possibly have reached home.

When we consider the purpose of the report prepared by Steunenberg, and submitted to Campbell February 2, 1902, it becomes obvious that certain matters must have been set forth and explained in it.

Steunenberg was endeavoring to persuade Campbell, and such other capitalists as Campbell might ask to join him in the project, to furnish and place in his hands a large sum of money for the acquisition

of a very considerable body of timber land, most of which belonged at that time to the U. S. Government, and on which but little more than 40 entries (6400 acres) had then been filed.

To interest moneyed men in the project it was manifestly necessary to convince them:

1. That timber existed of good quality and in sufficient quantities to pay for the establishment of a mill and the necessary improvement of waterways and log-drives, and the other incidents of a profitable lumbering operation. This evidently required fairly accurate descriptions of the land acquired, and to be acquired, and reliable estimates on the timber.

2. Any prospective investor would have to be assured that the land had not already been appropriated by other parties who might be unwilling to sell except at prohibitive prices. This information was probably given in a few lines, showing that the great bulk of the contemplated tract was still unentered Government land.

3. The most important and indispensable knowledge which would be required by any prospective investor, and without which knowledge the whole enterprise would be at the mercy of circumstances, from day to day, was just how Messrs. Sweet and Steunenberg proposed to acquire these Government lands, and what assurance they could give that, after getting the enterprise fairly launched, somebody else might not come in and secure the most desirable parts of the tracts in spite of their efforts.

Under this branch of the inquiry would naturally come also the question as to how Sweet and Steunenberg proposed to protect themselves, and their associate investors, against the probability that, as soon as the project had taken shape, and become noised abroad, the large number of new entrymen who would have to file on the land in order to get the title out of the Government, would seek to take advantage of the situation, and of Sweet, Steunenberg & Company's need for securing the additional lands in order to protect themselves on the investment already made, by putting the price on their timber claims up to somewhere near the actual value of the timber, which was, of course, several times the amount of the Government entry price.

To answer this question and give the project any air of certainty and profit, it seems inevitable that this confidential prospectus and detailed report, giving not only "the number of acres and the timber," but also "the chances about the matter, and in fact a full written report" (p. 3850), must have told something of the efficient and reliable organization already perfected,—of John I. Wells' special facilities for rounding up and "rustling" into the timber a sufficient number of what Mr. Barber calls "stranded miners" (p. 4820-22) and other unemployed men and women of the class likely to be hungry for a little "easy money" and willing to make the necessary entries, without other expense to themselves than the loss of a little time in the locating jaunts, and who could be depended on,—both

by reason of their friendly acquaintance with Steunenberg, Wells, Kinkaid and Pritchard, and also because of their inability to buy and hold the lands for themselves,—to turn over their entries, on request. Steunenberg's own large and loyal political following, and Kinkaid's local popularity (he says every one in the country voted for him—after election) (p.——), would naturally have been mentioned. The experience and competency of Downs as a timber cruiser, estimator and locator, could hardly have been omitted.

These were in reality the very factors which gave the enterprise, in these hands, a reasonable certainty of success and profit, and without which the project would have been no more likely to interest moneyed men in the winter of 1902 than for the eight or ten preceding years, during which the timber had stood there, open to entry, but undisturbed by the sound of the axe.

It is inconceivable that this elaborate report, which was expected, when prepared, to tell its own story and accomplish its mission without oral explanations, should have omitted any of these vital particulars; and when Mr. Barber testified (p. 4702) that he did not remember whether he saw and examined this report after receiving it from Palmer, and before telegraphing to have Steunenberg come to Eau Claire at his expense, or when the details of the enterprise were so thoroughly canvassed and discussed at the Eau Claire conference with Steunenberg, which lasted several days, and

upon which Messrs. Barber and Moon deemed it necessary to get such particular advice and such an elaborate legal opinion from Messrs. Frawley & Wilcox on the permissible **modus operandi** of obtaining Government timber land through entrymen, under the Timber and Stone Act (p. —), it seems quite certain that either his memory or his candor must have been at fault.

Steuenberg wrote to Campbell (p. 3861) March 13, 1902, from Eau Claire, so that he could not have started for Idaho until some time on that day, and could not have reached Boise before Sunday, March 16th.

Bowen must have left Boise as early as Saturday, March 15th, to make his location on Grimes Creek and return in time to file his application, as he did, Monday, March 17th.

Kinkaid tells us what an intimate friend and client of his, Bowen was (pp. 4221-2), and he drew Bowen's filing papers (p. 5341). Pat. Downs located Bowen, and Bowen named as his witnesses for final proof John I. Wells and Pat. H. Downs (p. 5341).

The letter of Steuenberg to Campbell of March 13th, **supra**, further indicates that at the date of the signing of the contract between Barber, Moon and Steuenberg on March 12th that Barber and Moon were advised by Steuenberg of exactly what Sweet's interest in the enterprise was and that Sweet really did not have title to the area of land that they now say Steuenberg represented. The letter reads:

"The Barber people accepted, and I have

agreed to execute papers with them as soon as I get legal assignment of Sweet's interest. * * * The conditions of the deal are very exacting on me, as they practically bind me to complete the deal and make me financially responsible. In other words, I take all the **risks as to title, etc.** I do not like this feature. In other words, I hardly think it fair, but then I have **every confidence in my representations and my ability to make them good, to have taken the chance.**"

Eleven of these 24 **ad interim** entryman, whose entries were made between the execution and the delivery of the March 12th agreement, were found and examined as witnesses in this cause.

Their testimony, and certain facts connected with their entries, and the other 13 entries which were made during this period, will be found in the record at the pages referred to in Appendix A and in the brief synopsis of their evidence given hereafter.

We have already mentioned that on April 10, 1902, besides paying \$32,925.00 for Sweet's interest in the enterprise, Palmer gave his checks to Steunenberg for \$5,800.00 and for \$1,200.00.

To reimburse himself for these advances Palmer, on April 14th, made two drafts on Barber and Moon viz: one draft for \$38,763.75 (covering the payment to Sweet of \$32,925.00, the \$5,800.00 check to Steunenberg, and exchange \$38.75), and one draft for \$1,201.20 (covering his \$1,200.00 check to Steunen-

berg and \$1.20 exchange), (pp. 2858-60). On the same day Palmer wrote to Mr. Moon (p. 4437):

“Dear John:

“I made draft on you today for \$38,763.75, which is per my letter of the 12th inst., \$38,725.00 and exchange \$38.75. The above was in payment of business already transacted before closing with Steunenberg.

“I also made draft on you for \$1,201.20, in payment of three entries made at the land office in Boise on Saturday, \$1,200.00, exchange on draft \$1.20. Gave Steunenberg my check for the above \$1,200.00, and expect to be advised today or tomorrow of the proper entries for same, that is, names of locators and land office receipt numbers, which information I shall forward to you.

“Wish you would have somebody check over written list of descriptions sent you with them. They do not have their records in very complete shape, and I would not be surprised if there were a few discrepancies in the descriptions, but they can be easily corrected. I am keeping a record here of all this land, money paid on same, etc.

“Suppose you understand it is necessary for Steunenberg to have possession of all the land office receipts, in case called upon to produce one at any time. Will send you a tracing of that district showing the road, river and

creeks from Boise to timber. This tracing is correct.

“Very truly,

“A. E. PALMER.”

Palmer's letter of April 12th, here referred to, undoubtedly explains exactly what his check for \$5,800.00 to Steunenberg was given for, and the previous “written list of descriptions” which this letter says he had sent to Barber and Moon, would have saved this court a great deal of tedious deciphering of the facts, from the mass of undigested evidence in the record.

Unfortunately these important and instructive documents, like the Steunenberg Report, and many other explanatory papers, at critical points in the history of these transactions, could not be found, or introduced in evidence.

The defendants claimed to have mislaid or destroyed them as of no further value (p.), although a very large number of quite insignificant and unimportant papers relating to the same period were carefully preserved.

With respect to the \$1,200.00, “in payment of three entries made at the land office in Boise on Saturday,” the record shows that no entries or final proofs were made at the Boise land office on Saturday, April 12th. But it shows that on Monday, April 7th, 1902, final proof was made on the entry of Mary A. Monroe, (application No. 317), which had been filed January 7, 1902.

On Tuesday, April 8th, final proof was made on

the entry of Arthur E. Brookhart (No. 320), filed January 14, 1902.

On Friday, April 11, 1902, final proof was made on the claim of John Kinkaid (application No. 322), which was filed January 22, 1902.

On Monday, April 14th, final proof was made on the claim of Norman H. Young application No. 321), whose initial entry had also been filed January 22, 1902.

Mrs. Monroe swears (pp. 1700-1) that her husband gave her his check on the Capital State Bank for part of her \$400.00 final proof money, that the check was refused at the land office, and she had to go to the bank and get it cashed, which she did, and she says that her husband had given her the check for this purpose two days before, and that he had kept an account in the bank ever since they had lived in the state—some two years (pp. 1696-1701).

If Mrs. Monroe testified truthfully—and she is uncontradicted—then the only “three entries” (final proofs) to which Palmer’s payment of \$1,200.00 could have been applied must have been the Arthur Brookhart, Kinkaid, and Norman H. Young entries. Young testified (pp. 1631-2), in a somewhat nebulous manner, that he used his own money in making his final proof, that he had some cash and some demands, certificates of deposit on one of the banks, had three or four deposit checks, dont’ know which he used, had some of them from January, he believes, some state warrants, some Ada County warrants, that were paid some time during the month of January, etc.

Young may have resorted to the casuistry of another witness (p. 139), who received his final proof money from Wells, and testified that he used his own money, and explained by saying, "If you give me a dollar is it your dollar or mine?"

John I. Wells testified (pp. 4117-18) that he loaned to Arthur Brookhart's father \$812.50 for the final proof money of Arthur Brookhart and his sister, Mrs. Lettie L. Stephenson, whose final proof was March 13, 1902.

In the great amplitude of Kinkaid's garrulous testimony no light is shed on the facts of his final proof.

No original entries were made in the Boise land office between April 5th and April 18th, and no other final proofs were made during April than the four above enumerated.

As to the \$5,800.00 check which Palmer gave to Steunenberg on this day, April 10th, and what it paid for, the record furnishes but incomplete and unsatisfactory information.

This was undoubtedly explained in detail in Palmer's letter of April 12th, already referred to, but missing from the record.

On page 4600, Steunenberg charges himself in account with Barber and Moon with the item "Advanced to purchasing agent, April 10, 1902, \$3,712.00," and this entry appears to be in partial explanation of the charge just preceding, "Received from A. E. Palmer, April 10, 1902, \$5,800.00."

This entry tallies with the statement in Palmer's

letter of April 14th, that the draft made by him that day to cover his check of \$5,800.00 to Steunenberg, as well as the check to Sweet in full payment for his interest in the enterprise "was in payment of business already transacted before closing with Steunenberg."

In other words, it would seem that \$3,712.00 of the \$5,800.00 so paid April 10th by Palmer to Steunenberg was in payment for completed entries turned over by Steunenberg at that date, in addition to the 40 completed entries (6400 acres) paid for in the \$32,925 payment to Sweet.

We have already seen that prior to March 12th only 35 final proofs and payments had been made on the 51 entries which may then have been controlled by Sweet and Steunenberg. Between March 12th and March 28th, 1902, inclusive, final proofs were made on 11 of the 16 initiated, but incomplete, Grimes Creek entries, which Sweet and Steunenberg may be supposed to have controlled at the date of the contract, March 12th.

Five of these newly completed entries were needed to make up the 40 "completed entries" for which Sweet was to be paid. This left six other claims on which final proofs and payments were made in the latter half of March. During the latter half of March also "something over \$800.00" was given by John L. Wells to W. J. Wills to make his own and his wife's final proofs and payments with, but on "going home and talking it over" Wills and his wife decided that between perjuring themselves at the land office, and

retaining the Wells-Kinkaid-Steunenberg money for their own use, the latter would be the lesser evil, so they kept the money and failed to make final proof (pp. 2070-71).

Of course Palmer did not allow Steunenberg to persuade him to reimburse "the enterprise" for the money which it had so paid to W. J. Wills and wife, and for which not even temporary receipts from the receiver could be shown.

The six extra claims on which final proof was made after March 12th—aside from the five needed to fill Sweet's quota of 40 completed titles—would only foot up, at \$550.00 apiece—the rate allowed for Sweet's claims—to \$3,300.00.

The \$3,712.00 charged as "advanced" to purchasing agent April 10, 1902," would have paid for nine final proofs, at \$412.50 each—the amount required at the Land Office—and if Mrs. Monroe was mistaken about her husband paying for her final proof, or if, unknown to her, her husband received the money from Wells for that purpose, and if the money for the Wills' final proofs (which were not made) was included in this item, it is possible that this is the true explanation of it.

In any event, this payment of \$5,800.00 from Palmer to Steunenberg, April 10th, of which only \$3,712 is accounted for as "advanced to purchasing agent," left \$2,088.00 of Barber and Moon's money in Steunenberg's hands, apparently as an advance to cover the making of future final proofs.

The final proofs made between March 12th and

March 28th, 1902, inclusive, were as follows:

March 12, on entry No. 301, of Uriah Flint.

March 13, on entry No. 303, of Uriah F. Mc-Birney.

March 13, on entry No. 304, of Lettie L. Stephenson.

March 13, on entry No. 305, of Martin S. Stephenson.

March 13, on entry No. 313, of Altha Gillum.

March 18, on entry No. 312, of Mack Gillum.

March 19, on entry No. 308, of Wilbert F. Wilmot.

March 20, on entry No. 307, of William F. Roberts.

March 21, on entry No. 315, of John C. Monroe.

March 26, on entry No. 316, of Charles M. Wilmot.

March 28, on entry No. 314, of Henry Ries (or Rice).

Mr. Kinkaid, with characteristic modesty, devotes several pages of the record to explaining that, notwithstanding Sweet's constant urging that he should take charge of the financial dealings with the entrymen, from the inception of Sweet's "enterprise and venture," he could not bring himself to do so, and he even gives it as his recollection that before leaving for Thunder Mountain, about the middle of April, 1902, he returned to Sweet and Steunenberg, intact, all of the various sums of money which they had placed in his hands for this purpose during the

several preceding months (p. 4257). The bank account opened by "Kinkaid Agent" is less treacherous than his memory on these points.

From that it appears (pp. 3180-82) that between November 6, 1901, when he opened the account, and December 4, 1901, he deposited \$4,042.25; that on November 9th, the date of Henry A. Snow's final proof Kinkaid drew from this fund \$225.00; on November 29th, the date of Minnie Snow's final proof, he drew \$175.00; on December 10th, the day of the Anderson, Nugent, Ball, Harvey Wells, and Hunter final proofs, he drew \$2,000.00, having previously drawn, on December 4th, 5th and 6th, during the time that the Anderson-Nugent party were vacillating and conferring with Kinkaid daily, about making their final proofs, as he says he urged and advised them to do, in four amounts, \$340.00; on December 19th, the date of Kate Hunter's final proof, he drew \$415.00 from this fund, to which, on December 14th and 20th, he added deposits of \$200.00 and \$210.00. On January 2nd he deposited \$120.00; January 27th, \$1,000.00. January 29th Mr. Kinkaid drew from this fund \$1,000.00, besides intervening smaller amounts, and on that day the final proofs of Louisa B. West and Gustave and Mary Link were made, and these three parties testify, and Wells admits, that they obtained their final proof money through Wells—of course, ultimately from Sweet—through the channel of Kinkaid, his disbursing agent. On February 10th Kinkaid deposited \$4,480.00, which may

be accounted for by Steunenberg's letter to Campbell of February 11, 1902 (p. 3895):

“My dear Mace:

My wife informed me over the phone last night of your telegram. I protected the timber deal in Boise yesterday for a few days by giving my personal note for the necessary amount.”

On March 3rd, \$1,000.00 was deposited to this account of Kinkaid's; March 10th, \$4,000.00; March 19th, \$3,000.00; March 28th, \$375.00, and April 11th, \$240.00. The \$3,000.00 item, deposited March 19th, is accounted for by the first item in Steunenberg's account with the Commercial Bank of Caldwell, on page 2843, viz: “March 18., 1902, cash to Kinkaid, \$3,000.00.”

This account of Steunenberg's also shows, “March 21, cash to Kinkaid, \$15.00;” and March 26th, “To self, \$2,000.00.”

Bearing these deposits and sources of supply in mind, there would seem to be some significance in the facts that on February 12, 1902, the final proof of Walter L. Harrison (No. 274) was made; on February 13th, the final proofs of William Pearson and Henry F. Benedix (No's. 276, 277); on February 14th, the final proofs of Louis K. Burns and Gustave H. Rothine (278, 279).

February 12th Kinkaid “Agent” drew from this source of supply \$2,200.00.

On February 20th, he withdrew \$950.00, and on that day the final proof of Charles A. Walker (No.

286) was made, and on February 21st, the final proofs of Samuel and Sarah Greig and Margaret Pearson (No's. 287, 288 and 289) were made.

On March 6th, the day of the final proofs of Lelia Lee Butler, Ida M. Briggs and Dora C. Burns (No's. 294, 295 and 296), Kinkaid drew \$850.00, having, within a very few days previous to that date, withdrawn, in several amounts, \$1,056.35. On March 10th, the day of the final proofs of Samuel and Emma Swan (No's. 299, 300), Kinkaid withdrew from this fund \$1,040.00. On March 12th and 13th, he withdrew \$1,660.00, and on March 12th Uriah Flint's final proof (No. 301), and on March 13th the final proof of Altha Gillum was made, and Wells testifies () that he gave to her at that time, for her own and her husband's proof, which was subsequently made, March 18th, about \$800.00.

On March 18th Kinkaid withdrew from the bank \$478.00, having previously withdrawn, on March 14th and 17th, \$345.00. And on March 19th and 20th Kinkaid withdrew \$1,250.00 each day.

While the precise amounts deposited and withdrawn by Kinkaid "agent" pp. (3178, 3180) from this bank account which was inaugurated November 6, 1901, do not, in every case, correspond exactly in date and amount with the sums required for the final proof of the entrymen who are shown, by the evidence, to have been supplied with funds for this purpose either through Wells or his understudy, Dean West, including \$137.50 which was, in most instances, paid to the entrymen on their return from

the land office with the receipts which they there obtained from the receiver, yet the correspondence is so general, and, in many instances, so precisely accurate, that the inference is irresistible.

The smaller amounts withdrawn from day to day between the final proof dates would indicate, as also appears from the evidence in many instances, that several of these entrymen were paid in various installments, as they required money, and not all at one time.

The deposits in this account between November 6, 1901, and April 11, 1902, aggregated \$18,667.25, and the withdrawals during the same period aggregated \$18,648.65. Adding to this the \$2,000.00 shown to have been drawn by Steunenberg from his bank March 26th, 1902, in time for the final proofs of Charles M. Wilmot and Henry Ries, and the ill-fated payment to W. J. Wills and wife, gives a total of \$20,667.25, or within a few hundred dollars of the total amount of Sweet's investment, as audited and ascertained by Palmer.

The subsequent course of this bank account of Kinkaid "Agent" (pp. 3180-3182-3193) throughout the remainder of the year 1902, and down to December 31, 1904, when the disbursements aggregated \$142,181.73, as against deposits aggregating \$142,265.06, leaving a balance of only \$83.33, suggests the possibility, on careful examination of the various items, which agree so constantly with the dates and amounts of payments shown by the evidence to have been made to various entrymen, that the \$140,000.00

investment to which Barber and Moon committed themselves by the contract of March 12th, 1902, was, designedly, passed through this account, and through Kinkaid's hands, and under his supervision, and thus kept separate from the other funds supplied by Barber and Moon to Steunenberg, in the larger amounts of \$5,000, \$10,000, \$15,000, \$20,000, \$25,000, and even \$50,000 (pp. 4768-4777), as time went on, and the scope of the enterprise developed.

After the settlement for Sweet's interest and the other payments to Steunenberg, above mentioned, April 10, 1902, the enterprise went forward rapidly.

Between April 18th and August 15th, 1902, 22 further entries were made in the Grimes Creek and Moores Creek timber, all of which passed promptly into the defendants' hands.

Mr. Moon visited Boise and the timber districts in May or June, 1902 (p. —)

As early as May, 1902, their attention had been directed to a larger and better body of timber on the North Fork of the Boise River (called in the record Crooked River), and they had given instructions to have it cruised. (4399-4401-4465).

In June, 1902, Downs cruised this body of timber, and temporarily suspended the location of entrymen in the Basin (—).

On his return he reported to Wells that there were about 100 good locations in the Crooked River country. After August 15th the location of entrymen by Wells and Downs was wholly transferred

from the Boise Basin to the Crooked River country.

Between August 27th and October 17th, 79 entries were thus made in the Crooked River district.

The work of locating entrymen was then suspended, for reasons which will appear later in this brief, until the following spring and summer, when the remainder of the desirable timber in the Crooked River district (something less than 4000 acres) was filed on by entrymen, through the solicitation and instrumentality of Wells, Downs and Kinkaid, and forthwith transferred to the defendant, through the instrumentality of Pritchard and Kinkaid.

Another body of very desirable timber, nearer to Boise than either of the other districts, and situated in Township 6, Range 4, had been brought to the attention of Barber, Moon and Steunenbergl during the summer of 1902, (4547), and they had the timber cruised and estimated by both Connors and Thornton in July and August, 1902 (See plaintiffs' Exh. 143 K).

This timber was not, however, at that time open to entry.

The township had never been surveyed, and when it should be surveyed, the State of Idaho must exercise or waive its preference right of selection with respect to the lands granted to it under the Act of Congress admitting Idaho as a State, before any timber and stone entries could be filed by individual entrymen.

During the winter of 1902-3, or the spring of 1903, this township was surveyed, and the official plat of the survey was filed in the land office at Boise, July 15, 1903.

Mr. Barber's vigilant determination to secure this timber is evidenced by the telegram which he sent to Steunenberg July 2, 1903: "Do not neglect Township Six, Range Four on the 15th." (p. 4559).

Mr. Barber, however, mistook the date at which the official plat was to be filed for the date at which the timber would be thrown open to entry, not understanding, probably, that the State was given 60 days from the filing of the plat for the exercise of its preference right of selection in the new township. During July and August Downs also cruised and estimated this 6-4 timber.

Through Kinkaid, Downs had obtained information as to the probable location of the lands which would be selected by the State (p. 4017-18).

Accordingly, a few days before the State's selection was publicly announced,—which was on the afternoon of Saturday, September 12, 1903,—Downs had been busily engaged in rushing wagon loads of willing entrymen out to the 6-4 timber and back to Boise, where he had them form in line at the land office on the evening of Saturday, September 12th, and throughout the day and evening of Sunday, September 13th, and until the opening of the land office Monday morning, September 14th.

During Saturday and Sunday Kinkaid was industriously employed in preparing the entry papers for these entrymen to file, on the opening of the land office, Monday morning.

Twenty-five of these entries were filed that day,

every one of which, shortly after final proof, passed to the defendants, and 24 of these are enumerated in the bill.

In addition to the foregoing general statement of the transactions brought in question by this brief, it seems proper, in view of the great volume of the testimony, and of the unrelated order in which much of it had, of necessity, to be taken, and in which it now appears in the record, to advert in some detail to the testimony of such of the entrymen as could be found and examined as witnesses, with respect to the facts of their particular entries, and to some other special circumstances which seem to throw light on the real nature of the transactions.

Before taking up the testimony of the entrymen, it may be helpful to give in their chronological order the correspondence which preceded and immediately followed the making of the March 12th, 1902, agreement:

	Page.
Letter, Steunenberg to Campbell, Feb. 2, 1902, enclosing his 10- or 12-page report. (This letter is not in the record, but is referred to in Steunenberg's subsequent letter of Feb. 8, 1902).....	3859
Reply letter, Campbell to Steunenberg, Feb. 8, 1902.....	3853
Letter, Steunenberg to Campbell, Feb. 11, 1902. (Protected the timber deal yesterday for a few days by giving personal note for necessary amount.).....	3859

- Letter, Palmer to Barber, Feb. 21, 1902:
 "Mail you today report of ex-Gov. Steunenberg, which explains itself. Mr. Campbell gave me this in confidence.".. 4367-8
- Letter, Palmer to Barber, Feb. 22, 1902:
 "About \$30,000 worth of timber already bought under Steunenberg's plan, and Mr. Campbell will likely make a pool of \$100,000 more to back the governor, but says I can have his place if I want it."
 Etc. 4369-70
- Telegram, Barber to Palmer, Feb. 26, 1902:
 "Have Steunenberg come to Eau Claire at our expense. Answer."..... 4370
- Letter, Palmer to Barber, Feb. 27, 1902:
 "Steunenberg should reach Boise tonight and receive Campbell's wire asking him to go to Eau Claire," Etc..... 4371
- Telegram, Palmer to Barber, March 1, 1902: " * * * Steunenberg here tomorrow." 4372
- Telegram, Palmer to Barber, March 1, 1902: "Steunenberg left for Boise this morning. Campbell wired him to come back. Should leave here Sunday."..... 4373
- Letter, Palmer to Barber, March 2, 1902, introducing Gov. Steunenberg: "You are already familiar with the object of his visit. He will explain details to you." 4373
- Letter, Palmer to Barber, March 2, 1902:
 "Gov. Steunenberg leaves tonight for

- Eau Claire. Wish you would show him a little attention as he is quite a man.”
 Etc. 4374
- Telegram, Barber to Palmer, March 7, 1902: “Will you serve as treasurer of corporation to develop Steunenberg scheme and be responsible for proper application of funds?” 4379
- Telegram, Palmer to Barber, March 7, 1902: “Yes.” 4379
- Telegram, Barber to Palmer, March 7, 1902: “Have trustworthy man ascertain if logs can be driven in large quantities from junction of Grimes and Moore’s creeks to Boise. Answer.” 4380
- Telegram, Palmer to Barber, March 7, 1902: “Jim Maloney here. Shall I send him to report on creeks”? 4381
- Letter, Barber to Palmer, March 7, 1902: “Steunenberg gone to Chicago to meet Sweet, who has large interest in scheme the governor is promoting. This proposition looks very fascinating to us,”
 Etc. 4381-2
- Telegram, Barber to Palmer, March 8, 1902: “Don’t like Maloney but prompt (erroneously printed: “presume”) action necessary.” 4383
- Telegram, Palmer to Barber, March 8, 1902: “Moore’s creek all right. Grimes creek driveable about three miles from

- mouth." 4384
- Telegram, Palmer to Barber, March 8, 1902: "Reputable party wires me large quantities have been driven down Moore's creek annually." 4384
- Telegram, Palmer to Barber, March 8, 1902: "We leave for Boise tomorrow night. Will wire you as soon as possible." 4385
- Telegram, Palmer to Barber, March 8, 1902: "Too little water in Grimes creek. Think Moore's creek supply ample. Mail reliable information tonight. Unnecessary me go Boise." 4385
- Letter, Barber to Palmer, March 8, 1902: "In the last 24 hours our suspicions have been aroused that other parties have been attempting to forestall Gov. Steunenberg in obtaining the timber in Boise Basin, and in order to protect him and possibly handle the situation ourselves, we have been trying to do business by telegraph. * * * We have heard nothing from the governor, who went to Chicago to meet his partner, Mr. Sweet." 4385-6
- Telegram, Barber to Steunenberg at Chicago, March 10, 1902: "When will you be here? We advise prompt action." 4386
- Steunenberg-Barber-Moon agreement of March 12, 1902 4387-4396
- Letter, Barber to William Carson, Burlington, Iowa, March 12, 1902: "Gov. Steu-

- nenberg is here today. I am in hopes to fix up some kind of a deal before night, whereby we get control of the four to eight hundred millions of timber in the Boise Basin about which I wrote you recently. * * * P. S. Since writing the above we have practically closed with the governor.” 4807
- Letter, Steunenberg from Eau Claire to Campbell at Spokane, March 13, 1902, announcing closing of deal with Barber and Moon 3861-2
- Letter, Moon to Palmer, March 13, 1902, enclosing contract of March 12th with instructions to verify representations; be satisfied that all conditions comply with agreement; audit Sweet's investment, Etc.,.... 4414-18
- Letter, Palmer to Moon, March 26, 1902: “Phoned Steunenberg yesterday. Day after tomorrow leave for Boise,” Etc... 4419
- Telegram, Moon to Palmer, March 29, 1902: “Estimator Denny Thornton leaves here Tuesday. Will report to you at Spokane.” 4420
- Letter, Moon to Palmer, March 29, 1902: confirming telegram about Estimator Thornton, Etc. 4421
- Letter, Palmer, from Boise, to Moon, March 30, 1902: “Am going into the timber tomorrow. Meet governor to-

- night. Capt. Henry and Turrish figuring on timber tributary to Boise River and Payette," Etc. 4422
- Telegram, Moon to Palmer, April 3, 1902:
 "If telegram refers to Payette, go slow; if other proposition, am inclined to go ahead." 4426
- Telegram, Palmer (at Spokane) to Moon, April 3, 1902: "Shall I close and send Thornton to estimate?" 4426
- Letter, Palmer (at Spokane) to Moon, April 3, 1902, reports trip through timber; advises purchase of Payette timber and Cobban option: "Wire me if I shall have the governor sign contract and proceed to close up deal." 4425-6
- Letter, Moon to Palmer, April 3, 1902: "Letter March 30th and telegram April 3rd received," Etc. 4427
- Telegram, Moon to Palmer (Spokane), April 4, 1902: "Yes, if everything seems square." 4428
- Letter, Palmer (Spokane) to Moon, April 4, 1902: "Your wire received. Have phoned governor I would be there on 6th or 7th to close with him. Thornton leaves this p. m. Will follow Moore's creek from Boise River to junction." * * *
 "The only title so far acquired is receiver's receipts." Etc. 4428
- Letter, Palmer (Spokane) to Moon, April

- 5, 1902: "Am going to Boise today to close with Steunenberg. You understand the only title you get pending patent is receiver's receipt." Etc. * * * Think it is his (Steunenberg's) intention to scrip the balance of the land. **This plan may cost more but is safer.**" 4429
- Telegram, Moon or Frawley to Palmer at Boise, April 7, 1902: (Not given in the record, but referred to on page..... 4431-2
- Evidently instructs Palmer to wait for Frawley letter.
- Letter, Moon (prepared by Frawley) to Palmer at Boise, April 7, 1902: (A long letter of final instructions, especially insisting on conditions precedent, 6,400 acres, Etc. (p. 4433.) 4432-4
- Telegram, Palmer (at Boise) to Moon, April 7, 1902: "Am ready to close on 16,000 acres provided you understand there are no titles until patents are issued." 4430
- Telegram, Palmer (at Boise) to Moon, April 11, 1902: "Deal closed. Statement and draft \$40,000 Spokane Saturday. Sweet's \$33,000 held by Steunenberg six months as guarantee to titles." 4435
- Letter, Palmer to Moon, April 12, 1902. Explaining payments of April 10th to Steunenberg, including the check for \$5,800. This letter not produced in evi-

- dence, but referred to in Palmer's letter of April 14.) 4437
- Letter, Palmer (at Spokane) to Moon, April 14, 1902, advising of drafts amounting to \$39,964.95: "In payment of business already transacted before closing with Steunenberg;" referring to list of descriptions previously sent, Etc. 4437-8
- Conveyance of bill of sale from Wm. Sweet to Barber and Moon, dated March 28, 1902; acknowledged in New York March 31, 1902; delivered to Palmer April 10, 1902, assigning all Sweet's right and interest in the enterprise, Etc..... 4440-43
- Letter, Moon to Palmer, April 2, 1902: " * * * Steunenberg must be careful not to let them (Capt. Henry, Etc.) get ahead of him in any way. Expect Thornton will reach you before you get this." 4445
- Letter, Palmer (at Spokane) to Moon, April 5, 1902: "Letter of 2nd received. Note what you say re. Capt. Henry." Etc. "Was offered 3,000 acres forest reserve scrip today at \$6.00 My impression was it could be bought for \$5.50. Will take the question up with the Government." 4446
- Opinion of Roy P. Wilcox on Timber and Stone Act and **modus operandi** of acquiring title to government lands through entrymen under the same, delivered to Mr. Moon: "At the time Gov. Steunen-

berg was here (in Eau Claire) the March 12, 1902, agreement was entered into." 4834-56

The foregoing comprises the documentary evidence in the record contemporaneous with, and immediately preceding and following the making of the March 12, 1902, agreement.

Some other documents, notably the Steunenberg report of February 2, 1902, and the Palmer letter to Moon of April 12, 1902, explaining his payments to Sweet and Steunenberg, are missing.

Governor Steunenberg is dead; Sweet's whereabouts could not be learned; Palmer was in Canada under treatment for mental irresponsibility; the evidence of Messrs. Barber and Moon with regard to the making of this agreement, as well as with regard to the course of conduct subsequently pursued under it, will be found in vols. XI, XII and XIII, pp. 4356-4860.

THE EVIDENCE RELATING TO THE SEVERAL ENTRIES ON GRIMES AND MOORE'S CREEKS.

A brief glance at the history of what is called the March 12th agreement the "enterprise and venture of exploring and obtaining title" to these Government timber lands, as previously carried on by Sweet and Steunenberg, and its status on March 12, 1902, when Barber and Moon purchased, and succeeded to, Sweet's interest and part in the project, may give a clearer understanding of the purport and purposes of this March 12 agreement.

All of the Boise Basin entries made before March 12, 1902, in their chronological order, are given in the Appendix A. at the end of this brief, and all of such entries following March 12, 1902, are given in Appendix B.

The first entries in the Boise Basin were made in August, 1901, under the auspices of Paris & Manning, a firm of promoters at Minneapolis, Minn., who advertised for persons to take up Timber Claims in "a large body of fine Government timber in the 'Boise Basin, Idaho,'" and offered to take them from Minneapolis to the timber, locate them, and pay their expenses to the timber and back to Boise, for \$135.00 apiece.

In response to this advertisement Henry A. Snow, Patrick H. Downs, Rose Anne Walker and Julia M. Anderson left Minneapolis early in August, 1901, and were met at Boise by Mr. Manning, who, within a few days, drove them out to the timber in Sections 8, 17, and 18, in Township 7, Range 5, about forty-five miles northeast of Boise, and two or three miles north of Centerville.

Snow and Downs had both had some experience as Timber Cruisers in Minnesota, and they made some explorations of the timber in general, before selecting their locations.

The "Timber and Stone Sworn Statements," and "Applications to Purchase," of these four persons were filed in the Boise Land Office August 17, 1901, and were numbered respectively, Nos. 203, 204, 205, and 206.

Mrs. Walker abandoned her entry without making Final Proof.

Between Aug. 17th and Sept. 20th, 1901, four other Timber and Stone entries on Grimes Creek were filed at the Boise Land Office, besides some which were abandoned without Final Proof, and some on the Payette River, a territory not involved in this suit.

The four Grimes Creek entries were:

No. 213, filed Sept. 7th by Minnie Lyons (who shortly afterwards married Henry A. Snow and made her Final Proof Nov. 20th, 1901, under the name of Minnie Snow);

No. 214, filed Sept. 10th, by Chas. J. Burchard;

No. 215, filed Sept. 10th, by Wm. F. Snow.

No. 218, filed Sept. 11th, by Jas. H. Hamilton.

These seem to have followed in the wake of the Paris & Manning project, which collapsed early in September, at which time Manning left Idaho and returned to Minnesota, owing Snow and Downs for some cruising they had done for him, and leaving some other debts.

The seven entries so made, which were followed by Final Proofs and Payments, were in neighboring Sections of Township 7, Range 5.

Beginning with Application No. 219, Sept. 20th, 1901, the numbers and dates of the Boise Basin entries, seventy-two in all, filed prior to March 12, 1902, with the names of the entrymen and women, are given by Mr. Balderston at Pages 3294-9, from the Land Office records.

These entries, with the descriptions, dates of Final Proof, dates of Receiver's Receipts, and dates of Deeds from the several entrymen to A. E. Palmer, and some other details shown by the exhibits and evidence there referred to, are set out in chronological order in the Schedule, Appendix A, at the end of this Brief.

Seven of these 72 applications (Nos. 222, 247, 250, 270, 309, 310, 311) were abandoned without Final Proof, and two others, (Nos. 295, 296) were relinquished to the Government shortly after Final Proof, and the purchase-money was returned to the entrymen.

While there is some evidence that Paris and Manning held out to the entryman whom they induced to locate, the prospect of being able to sell their claims to some large lumber Company, we do not think the evidence with regard to these entries establishes the existence of such a specific prior agreement or understanding, as to invalidate the entries, or to entitle the Government to a cancelation of the Patents. This applies to the entries of Patrick H. Downs (No. 204), Wm. F. Snow (No. 215) and James H. Hamilton (No. 218), named in the bill of complaint.

The entries of Homer C. Granger (No. 220), Jennie E. Wells (No. 221), and the five entries (Nos. 224, 225, 226, 277 and 228) of Harvey H. Wells, Albert P. Nugent, Arthur Anderson, Abel E. Hunter and James T. Ball, are the subject of much testimony in the record.

This testimony will be found at the pages indicated

opposite these entries in the Schedule Appendix A. The substance of it is that all of these entries were made at the suggestion and solicitation of John I. Wells and on his promise to furnish the money for their final proof, and to secure to the several entrymen "easy money" amounting to about \$250 in each case, with the understanding that they should transfer the lands so acquired as he might direct.

The five entries (Nos. 224-228) were suspended and subsequently canceled by the Land Office, as fraudulent on this ground, and the General Land Commissioner, and later, the Secretary of the Interior, affirmed this decision.

No patents were ever issued on these entries, and they are not named in the Bill.

It is not clear from the evidence precisely what plan for the ultimate disposition of these entries Wells may have had in mind at the time they were made, but it does clearly appear that, before the time arrived for making final proofs on any of them, an arrangement had been consummated between Wells, Kinkaid, Sweet and Downs to do exactly what was done with practically all of the subsequent entries. Wells puts the date for this arrangement as the latter part of December and before January 10, 1902. (p.). Kinkaid is even more indefinite. Downs, whose functions were to receive the entrymen at the timber as they were sent up to him by Wells and give them the locations on which they were to file, does not attempt to give any date for the commence-

ment of the operations in which Sweet was interested.

Kinkaid testifies (p. 4224-5), "In the summer or fall of 1901, Mr. Clapp, a Minnesota man and elegant gentleman whom I met at Boise, and one John Fraser, came to me and said, 'Don't you want to go into the timber matter?' and I said, 'I don't know anything about the timber matter and don't know as I do.' They told me that they had cruised out a lot of that country up in the Boise Basin and that there was some very good timber up there. And they said they would file me for \$200, and I thanked them, and that was the first I remember of having anything to do with timber. I don't know anything more about it until I was up in the Basin about November or October, 1901, with Mr. Ingalls, a mining man from Texas. * * * As we came through Centerville, John I. Wells had missed the stage and rode to Boise with us."

Then follows a somewhat rambling narrative covering 40 to 50 pages, much of which is flatly contradicted by the bank account of "John Kinkaid, agent," and by other documentary evidence, but which, taken as a whole, shows that at some time prior to November 6, 1901, when the "Kinkaid agent" bank account was opened, Sweet agreed to furnish Kinkaid with funds for the purpose of making the final proof payments for such entrymen as Wells and Downs had already located, and might thereafter be able to locate.

The evidence in regard to the entries of Michael

Koppas (No. 238) filed October 9, 1901; John Bates (No. 246) filed October 21, 1901; Evelyn O'Farrell (No. 280) filed November 27, 1901; John R. Gary (No. 298) filed December 19, 1901, and James O. Baker (No. 306) filed December 24, 1901, each of which is named in the bill, does not, in our judgment, establish that any of these entrymen were at the time of their respective entries conscious participants in the unlawful project of Sweet, Kinkaid, Wells and Downs and we shall not contend that the Government is entitled to a cancellation of any of the patents issued on these entries, on the evidence in the present record.

According to the evidence, Koppas did not convey his claim to the defendants until July 29, 1904; John Bates, not until March 17, 1906; Evelyn O'Farrell, not until August 1, 1905; John R. Gary, not until March 20, 1903; James O. Baker, not until July 7, 1904, and each of these parties, except Koppas (who could not be found) testified that they had no understanding of any sort prior to their entries, and no negotiations thereafter, looking to the transfer of their claims, until very shortly prior to the dates of their respective deeds.

Wells testifies that he loaned Homer Granger some of the money for final proof (p. 4113); that he loaned the father of Lettie L. Stephenson and Arthur Brookhart \$812-50 for the final proofs of his daughter and son (pp. 4117-8); that he loaned Martin S. Stephenson, the husband of Lettie, the money for his final proof (pp. 4118-9).

At pp. 4150-2 he says, "I assisted pretty nearly all

of the people that were located in the spring (a missprint for "fall") of 1901," and that he got the money from Sweet, whom he had known ever since 1895 (p. 4149). Wells enumerates (p. 4150-51) as parties to whom he remembers furnishing the money for their final proof Dean West (No. 248), Louisa B. West (No. 262), Charles Nelson (No. 260), William Pearson (No. 276), Margaret Pearson (No. 289), Leila Lee (No. 294), Arthur E. Brookhart (No. 320), Gustave A. Link and Mary Link (Nos. 263- 264), Harry L. Clyne (No. 259), Louis Nibler (No. 261), Edward Brisbin (No. 360), Wm. W. Abrams (No. 258), Louis K. Burns (No. 278), Dora Burns (No. 296), Charles W. Ballentine (No. 256), Lettie L. Stephenson and Martin S. Stephenson (Nos. 304, 305), Altha Gillum (No. 313), Samuel Grieg and Sarah Grieg (Nos. 287, (No. 341, John E. Hobbs (No. 993), and Mary (No. 341), John E. Hobbs (No.), and Mary Thompson (No. 589), and that he furnished a part of the money for final proofs of Homer C. Granger and W. L. Harrison, and part or all for Wilbert F. Wilmot. He does not profess that this list is complete, and elsewhere he mentions furnishing the money for Mack Gillum and some others.

Dean West lived, at the time of his examination, in the same house with Patrick Downs (p. 200). He filed a claim in the Boise Basin Oct. 26, 1901, at the suggestion, he says, of his brother-in-law, Samuel Dye, since deceased. He said Dye told him, "That they wanted to get up a load to take up some timber in the Basin country about Centerville and if I

wanted to take up a claim I could go with him if I paid \$25 for location, for filing, and so on, and he told me there was \$250 in it for me over and above expenses.”

Accordingly he went the next morning with Samuel Dye and his son, Oral Dye, (neither of whose final proofs were accepted) and John Keene. John I. Wells gave the party a note to Patrick Downs, who was in the timber and they paid Wells a locating fee after they had gotten back and filed their entries. They met both Pat Downs and Henry A. Snow at Centerville, who showed them over the ground, claimed to show them the corners of the land, and gave one of the party, Mr. Dye, the descriptions to take back to Wells (pp. 201, 202). West got the money from Wells for his final proof, four hundred and some odd dollars. He had been told if he needed any money to prove up with where to go and get it. (p. 202). He did not give Wells any note for the money or pay him any interest. (p. 203). He turned the receipt which he got at the Land Office over to Wells the same day or a day or so later. (p. 204). Later, and he thinks the day after getting his final receipt from the Land Office, he and his wife went to Mr. Pritchard's office and executed a deed and received from Pritchard \$250. Wells was there at the time. (p. 204-5-6). His wife also (Louisa B. West—No. 262) received \$250 from Pritchard at the same time. (p. 206). West says that one day Wells met him on the street and asked him if he was busy and, learning that he was not particularly busy, gave him

the money for four persons to prove up with and told him to go around and give it to them, which he did. His recollection is that he gave Maggie Pearson \$412.50 or \$415.00, and the same amount to Mrs. Lee (No. 294), Mrs. Briggs (No. 295), Wm. H. Lewin (No. 350) and his wife, Gertrude Lewin (No. 371), and he went to the house of Louis K. Burns (No. 278), who was not at home, and left his final proof money with Mrs. Burns. He also remembers giving the final proof money to Henry Ries (No. 314) (pp. 206-8).

Dean West's partner in a mining business, Charlie Nelson (No. 260), told him that Downs and Wells paid him \$5 for every one he could get to locate timber and, if West would help him, he would divide with him. They were to tell these people that, if they paid their location fee and expenses to the timber and for filing, there was \$250 in it for them, and, if they didn't have the money to prove up with, they could find it at John Wells' office.

West got several to go and locate under this agreement. He remembered Wm. Pearson and wife (No. 276, 289), Sam Grieg and wife (No. 287, 288), Louis K. Burns (No. 278), Henry Ries (or Rice) (No. 314), and Lewin and wife Nos. (350, 371).

Notwithstanding the ingenious manner in which this witness was led into denying the making of any "agreement" on cross examination, and notwithstanding his evident solidarity with and loyalty to the enterprise, he testified (p. 216), "In one sense I might consider myself under obligation to sell it to

the parties that Mr. Wells and Mr. Downs——” but at this point defendants’ counsel interrupted him and tried to turn his testimony into a more satisfactory channel. In this, however, he was only partially successful for, in answer to the very leading suggestion that West was undoubtedly making the application for his own sole benefit, the witness answered that he was doing it to make a few dollars and didn’t know of anyone who deserved or needed the money more than he did. (p. 216).

The next witness in the record (p. 219) was Dean West’s wife, Louisa B. West, who made the location trip a day or two before December 19, 1901, with Louis Nibler and Gustave and Mary Link, and who filed her application (No. 299) December 20, 1901. She also says that her brother, Samuel Dye, suggested her filing an entry, and she says that her husband, Dean West, attended to all the business. She thinks Pritchard paid her something over \$200 when she made the deed. (pp. 220-2).

Charles W. Ballentine, whose entry (No. 256) was filed Oct. 29, 1901, says (p. 266, etc.) that he was down on the street one evening talking with Nelson (Dean West’s “partner”) “about daily life, and daily duties of life and different work, and he wanted to know if I would like to make an easy piece of money, some easy money, and of course I told him yes if it was all right. * * * He saw me in a day or so and told me what it was—take up a piece of timber land.” (p. 227).

Nelson told Ballentine that this “easy money”

would be "between two and three hundred dollars, somewhere along there." So Ballentine went to the timber with Mr. and Mrs. Hollister(Nos. 251, 252) and Nelson and Henry A. Snow. Nelson told him there would be somebody to buy it (p. 229) and his understanding was "I was to turn it over and make between two or three hundred dollars out of it, was to turn it over to somebody that Nelson said, was somebody that Nelson was working for." (p. 230). Ballentine made no selection of the ground, but was shown a number and told that was his. (No. 231). He got the final proof money from John I. Wells, "There wasn't much said. I made my wants known and got the money, three or four hundred dollars, somewhere along there; gave no note or due bill for it and paid no interest." Wells left the final proof money for Ballentine scattered around his (Wells) office (pp. 233-234).

When the suspension of entries was released, Downs or Wells told him about it and he went and got his final receipt, and the next day—or, perhaps a few days later—he went to Kinkaid's office through Wells' direction, where "there wasn't much said about it—just done business." (p. 235). He doesn't remember exactly the amount of money he received, but it was somewhere in the neighborhood of \$300. He doesn't remember signing a deed but signed some kind of an "article," "it looked to him like a contract." (pp. 236, 237). Ballentine was a bricklayer at that time.

Defendants' counsel were not very felicitous on

the cross examination of this witness. After demonstrating to Ballentine that the understanding on which he made his entry was not an "agreement," the witness answered (p. 247) "I didn't make no 'agreement' with Nelson to sell it to Nelson, but it was understood that I was to get between two and three hundred dollars for taking that timber claim up for somebody."

Louis Nibler, whose entry (No. 261) was filed Nov. 1, 1901, testified (p. 311, &c) he was a laborer 33 years old, residing at Boise at that time and unmarried. He thought Mr. Link (No. 263), a bartender in Lemp's saloon, first talked with him about taking up the claim; Downs also talked with him. "He said I could go up and take up a timber claim and get so much money and they would furnish the money to prove up on." (p. 313). That John Wells would furnish the money and Nibler would get \$250; the land was to go back to Wells. Nothing was said about a location fee. (pp. 313, 314). But \$25 was taken out when he got his money, after proving up. (p. 314). Mr. Pritchard held that out.

Henry A. Snow, who also assisted Downs for a short time in the locating business, took the party to the timber, and, on their return, prepared their filing papers in Lemp's saloon. (pp. 315-316). Wells came to Nibler and gave him the money for his final proof, \$412.50. He gave no note for it and paid no interest; nothing was said about his paying it back. When Nibler got his receipt from the Land Office, he took it to Mr. Pritchard the same day or the next day and

told him his name and that he had a receipt to turn over to him. Pritchard said "all right" and Nibler turned over the receipt and Pritchard paid him \$225. He had understood he was to receive \$250 but he said nothing and went away with the money Pritchard gave him.

On cross examination a strenuous effort was made to make Nibler say that his talk with Downs was immediately after instead of just before the filing of his application, but, in answer to leading questions on that point, the witness said, "I couldn't say for sure." (p. 329). After several pages of badgering over the word "agreement," the witness said, "In one way it was a common understanding (p. 333), and, on p. 338, he said, "I knew where I could get the money to prove up and that I would be expected to convey the land to them. I had the understanding that I was to get the money from him (Wells) to prove up on and, after I had proved up on it, I was to turn the ground over to him and get \$250 additional." This witness also said that he supposed, in answering the questions on cross examination, that an "agreement" had to be something in writing. "I didn't have no papers to show for it." (pp. 338-9).

Walter L. Harrison filed his application (No. 274) Nov. 26, 1901, on the suggestion of Dean West (p. 760), who told him he could get \$250 out of it if he wanted to sell, "as he had somebody I could sell it to and get \$250," and that John Wells would see to the location—look after it. He went to Wells and told him he had decided to locate and Wells sent him

up to the timber (p. 763). He went with Pat Downs, Evelyn O'Farrell (No. 280), Will Pearson (No. 276) and Louis K. Burns (No. 279). (p. 764). Harrison got out of the wagon and walked over the land where Downs told him the location would be; the corners were not pointed out to him; the rest of the party did not get out of the wagon (pp. 765-6). He went to Wells' office on his return before filing any papers. When it came time for final proof, he went to Wells and got \$200 of the money, giving no note and paying no interest; nothing was said about repaying it. (p. 769). When the final receipt was ready, either West or Wells told Harrison he could "have the matter straightened up by going to Pritchard's office." He did so and Pritchard gave him \$450 and he signed a deed. (pp. 771-2). He had told Wells that he would sell it to him or his company and understood that was final. (p. 772). Pritchard retained the \$200 for Wells out of the \$650, which was understood to be the purchase price, giving Harrison only \$450.

In cross examination, he said that at the talk with Dean West, before his first filing, West told him that, if he entered the land, there would be an opportunity to make \$250 on it if he wanted to sell. (p. 775).

William Pearson's testimony (pp. 653-682) was of substantially the same character. His application (No. 276) was filed Nov. 26, 1901, at the solicitation of Dean West, who told him he could file a claim, prove up on it and sell it and make a piece of money on it, about \$250. "I sort of think I understood some way from Mr. West that I could borrow the money to

prove up." (p. 655). He did get the money to prove up from John Wells. (p. 659). On cross examination he said (p. 680) that he was advised at the time he made the entry that he could make about \$250 out of it. He testified that he could not say whether he had answered certain questions in the District Attorney's office in March, 1907, as shown by a typewritten statement exhibited to him, in which the answers were to the effect that before he went into the timber at all Wells had given him to understand that he would get \$250 and that they would furnish the money. (p. 671).

Harry L. Clyne (p. 2497-2525) was a paperhanger living at Boise in 1901 and filed his entry Oct. 31, 1901, on the suggestion of Nelson, who asked him if he didn't want to make two or three hundred dollars "easy money," to which he replied "Sure, I am ready for it." (p. 2498-99). Whereupon Nelson gave him the description of the claim and Clyne filed on it the next day. He did not go up to see the land, but says he had been up there before. (p. 2499). He says when he filed on the land, "The supposition was that I was going to turn it over for a consideration, where I could make a piece of money out of it; at least Mr. Nelson gave me to understand." (p. 2501). Wells told him when he got ready to prove up he could let him have the money or get it for him, and, when the time came January 24, 1902, he gave Clyne \$420. (p. 2501-2). Wells told him when he gave him the money, "If you have got someone you can get the money from, it will look much better when

you go there to say that you got the money from someone else," and Clyne mentioned he was working for a man by the name of Springley. "And I said, 'I (you) can leave part of the money over there and he can give me a check for it,' which I did. (p. 2502). Clyne got a temporary receipt at the Land Office and took it over to Wells at his office.

Clyne's understanding with Nelson, that he was to turn the land over and make a piece of money out of it, was before he located. (p. 2505). Clyne went to Thunder Mountain in the spring of 1902 and, on his return, after getting his final receipt from the Land Office, he went to Pritchard's office by the direction of Wells and signed a deed and received from Pritchard \$175, "the balance of what was supposed to be due me after taking out the extra \$25 for filing the claim." (p. 2504). Clyne had borrowed \$50 from Wells after proving up, and the deduction of this and the \$25 location fee was made by Pritchard without any conversation on the subject. (p. 2503-6).

On cross examination, after eliciting a somewhat spectacular denial of any previous acquaintance between the witness and Wells, Downs, Kinkaid, Pritchard, Steunenbergh, Barber, Moon, Rand or Palmer (p. 2509), counsel brought out, in answer to a very leading question with respect to the entering into any agreement, the following answer: "No further than Mr. Nelson told me I could make this easy money and he would furnish me the money and furnish me a buyer and I told him 'All right'." And, in answer to numerous further questions intended to

disprove the "agreement," the witness repeatedly said, "No more than what I have stated."

Louis K. Burns filed his application (No. 278) on the suggestion of Dean West Nov. 26, 1901. West "came over one morning and wanted to know if I didn't want to make a couple or three hundred and I told him yes, and he said, 'There is a load going up in the morning and if you want to go up and file under the timber and stone act you can go.' " Burns went with the party, which consisted of himself, "and Bill Pearson and Harrison and a lady by the name of O'Farrell." (p. 160). Pat Downs went with the party; they reached Centerville about dark. Burns gives the following account of their location (p. 161):

"Q. When did you see the land?

A. The next morning I seen it off about three or four miles. I didn't go to it. He said that was good timber and I guess he knowed all about it.

Q. Then you didnt' go upon the land?

A. No.

Q. Did any of those with you go upon the land?

A. It seems to me Harrison said he had seen his on the way back. His was this side of Centerville. He seen his, I think. I don't think Pearson seen his because he took about the same as I did."

After getting his receipt from the Land Office, Burns took it up to Pritchard's office and turned it over to Pritchard and got \$240, which Pritchard took

out of a drawer and counted out to him. He says he thinks Pritchard took \$10 as a rake-off for himself, but he took what they gave him and said nothing about it. Wells was present at the time.

Samuel Greig, a painter, filed his application (No. 287) December 7, 1901, at the suggestion of Dean West and Wm. Pearson, who told him that the money would be furnished to prove up with and he could get \$250 for it if he wanted to dispose of it. (p. 362). He understood from the conversation that he could get the money from John Wells. (p. 363). Pat Downs located him and his wife, Sarah Greig, on adjoining claims. (p. 364). On returning from the timber, he went to John Wells' office with the description and had some conversation and paid him the \$25 locating fee. The morning before proving up he went to Wells and got \$800 for proof on his own and his wife's claim. He went directly from the Land Office after proving up, to Pritchard's office and gave him the receipts from the Land Office. (p. 368). Some time afterwards he got notice from the Land Office and got some further papers, which he took to Pritchard, who gave him about \$250. (p. 369). Some time afterwards he made a second deed. (p. 370).

It was generally understood that Pritchard was buying claims and paying \$650. (p. 383).

Sarah Greig, the wife of Samuel, says that her husband told her she could take up a timber claim and make \$250 out of it. (p. 384). She went with her husband and was located by Pat Downs on an adjoining

ing claim and filed her application (No. 288) the same day, December 7, 1901. Neither she nor her husband had any money with which to make final proof when they filed their entries. (p. 385). She says (p. 387), "I was my understanding that we would go right through with the deal, that we would get the money—get \$250 to the good." She understood that she was to make the entry; that the money was to be furnished her, and that she was to convey the property to some one whose name she did not know and get \$250 above all expenses. Her husband told her this when he first spoke to her about taking up the claim. (pp. 387-8).

Margaret Pearson, wife of Wm. Pearson, made the location trip with Greig and his wife, Pat Downs and a man named Walker. (p 629). Her application (No. 289) was filed Dec. 7, 1901. Her husband first spoke to her about it. They had no money to buy with at that time and her husband told her they could borrow the money. Dean West made out their filing papers; they were rooming in his house. (p. 629-630). On the day for her final proof, she was in talking with Dean West's wife and he came in and told her she would find something she was looking for. She went to her room and found \$412.75, "right on the counterpane of the bed." (p. 631). She turned her Land Office receipt over to Pritchard and received \$250. (p. 632-4). She thought the land was worth more than that, but expected that was all she could get out of it and wanted the money at the time

Leila Lee Butler filed her application (No. 294) on

the suggestion of Dora C. Burns (No. 296) December 19, 1901. (p. 1961). "Mrs. Burns said that if I would do as she said she would show me how to make \$200 and I musn't ask her any questions but just have faith in her and she would see it through all right." This proposition she accepted. Mrs. Burns, Mrs. Briggs and her brother-in-law constituted the party. She left everything to Mrs. Burns (p. 1967), who said Dean West would bring the final proof money to her, and he did, saying, "You don't want to forget that this money came out of the bank." (pp. 1967-8). The next day or so, after getting her receipt from the Land Office Wells told her to go to Pritchard's office in the Sonna block, which she did, and told him she was one of the ladies who had come to get her money. She told him her name and he gave her \$200, having her sign some paper—which she supposed was a deed. (p. 1969-70). She was told to come back later and make another deed, which she did. (p. 1971).

Martin S. Stephenson, who, with his wife, filed applications (Nos. 304, 305) December 24, 1901, was running a livery barn and freight teams in Boise. Charlie Wilmot first spoke to him about filing a claim and brought John I. Wells to the barn to see him. Wells said if he wanted to get a piece of timber he could get it, "and he would locate us and after awhile we could dispose of the land. He said we could make about \$250 and that it didn't make any difference about the money; that I would have the money. I needn't worry about the money." (p. 3677-8). Stephenson and his wife went to Centerville and were

located by Pat Downs and, on their return, went to Wells' office, and Wells prepared their filing papers. He couldn't say whether Wells or Pritchard handed him the final proof money. (p. 3679-80). After making final proof and payment, he took the receipt to Pritchard and Wells' office and signed some paper; didn't ask any questions. Pritchard said, "Sign your name right here," and he and his wife did so. (p. 3682). On getting their final receipts, they took them to Pritchard's office and, without any conversation, received "twice \$250, or a little better," for his own and his wife's claims. (p. 3687). Before taking up the claim, Wells told him there would be a company in to buy the land and he was to get money for conveying it. (p. 3689). On cross examination he said he understood he was to get in the neighborhood of \$250. He had nothing to pay for the costs—didn't have to; it was just the money that was given him to put up. He didn't understand what the price of the claim was; simply understood that he could get \$250. (p. 3702).

Mack Gillum was told by Wm. Pearson that he could take up a claim and sell it at \$250 profit, and he told him to go and see John Wells about it, which he did. (p. 407). Wells told him he could get money to prove up with, but Gillum said he didn't want it. Subsequently, however, Wells gave Gillum's wife \$800 for their final proof and it was Gillum's understanding that he was expected to make the money good in some way or else turn over the land. (p. 411).

"Q. I will ask you if you didn't have a defi-

nite agreement with Mr. Wells before you went to view this land, before you located; that you were to turn the property over to him or some one he named and get \$250 above all that it cost you?

A. That is the way that I understand it; yes, the substance of that."

Gillum and his wife took their final receipts to Pritchard's office on the same day or the day after receiving them from the Land Office and received \$475 for both of them, and signed a deed which recited the consideration at \$2,000. (p. 413).

This practically covers the testimony of the entrymen whose entries were filed before March 12, 1902. The three or four others who testified are indicated in Appendix A, which also gives a reference to their testimony.

Kinkaid and Norman Young, who filed their entries (Nos. 321 and 322) Jan. 22, 1902, do not admit the making of any special agreement, but their connection with the enterprise is sufficiently established to render any agreement quite unnecessary. The fact appears that their entries were promptly turned over to Palmer, and we have already pointed out that their payments on final proof appear to have been paid out of the \$1,200 which Palmer gave Steunenberg April 10th. Kinkaid, however, is not named in the bill, and consequently no relief can be granted with respect to his patent in this suit.

The testimony of the entrymen whose entries followed the execution of the March 12, 1902, agree-

ment, and certain facts with respect to the entries of those who were not found and examined as witnesses, will be found at the pages referred to opposite their respective names in Appendix B. The circumstances under which these entries were made, and the fact that they were manifestly and beyond the possibility of dispute made for the express purpose of enabling Sweet and Steunenbergh to make good the 6,400 acres of completed entries and the 5,000 acres of initiated but uncompleted entries ("contracted for", to use Mr. Bundy's expression), have already been shown. All of them were located by Downs; nearly, if not quite, all of their entry papers were prepared by Wells and Kinkaid; their entries were made at the solicitation of these men or of Dean West, and, almost immediately on the making of their final proof, the money was furnished to several of them by Wells; they either executed deeds to Palmer or delivered their receiver's receipts to Pritchard and Kinkaid for Palmer and the defendants and received the stipulated and uniform pay for their participation in the scheme.

To meet this array of facts from which, standing alone, the conclusion would seem to be irresistible, the defendants point to the answers made by many of the entryman examined, to certain skillfully prepared leading questions of the counsel for the defense, on cross-examination, in which these entrymen denied the existence of any "agreement," made before the filing of their original entries, that they would do precisely what each one of them did do with the titles, when acquired.

These questions manifestly called for, and required, a legal conclusion in the minds of the several witnesses, as to the meaning of the word "agreement," and, in several instances, where the entry-men frankly admitted that they never had any other purpose or intention, in making their entries, except to turn them over in such manner as might be suggested by the persons who solicited them to locate,—and thereby to earn the "easy money" which was held out as the inducement for their taking the trouble to ride to the timber, and go through the subsequent formalities at the land office,—yet, in response to these categorical questions as to the making of any "agreement," they answered in the negative. We think these negative answers, taken in connection with the facts shown, must be attributed to an erroneous legal conclusion by the witnesses as to the meaning of the word "Agreement," in the Timber and Stone Act, and that such answers, therefore, go for nothing, when inconsistent with the reasonable conclusion from the other evidence.

Further to combat the conclusion which most men of experience and common sense would naturally draw from the uniform course of conduct, and the marked similarity and continued repetition of the acts of all the parties concerned in this transaction, (which speak so much louder and more convincingly than any words), the defendants assert that the acquisition of practically all the lands, in these successive tracts, through the instrumentality

of entryman, was a mere accident, or series of accidents, contrary to the plans and purposes of the defendants, and rendered necessary by the involuntary frustration and forestalling of their plans.

In other words, they assert that from the date of the March 12th agreement it was always their purpose and intention to acquire all lands which had not been entered on, by the location of so-called lieu land scrip, and that the reason why they did not acquire any of the successive tracts in this manner was because, every time that they had determined on the location of scrip on any particular tract, the desirable lands in such tract were taken up, and removed from the possibility of location by "scrip" through the unaccountable perversity of a body of entrymen, who sprang up out of the earth just in time to forestall the defendants' "scripping" purposes, and filed timber and stone entries before the defendants could get around to the purchase and locating of the intended scrip.

To support this claim, the defendants have introduced into the record, as they did into the contract of March 12th, 1902, various references to the possibility of acquiring some of the coveted timber by the location of scrip.

In the latter portion of this brief we shall call the attention of the Court to the reasons why this contention seems to us forced and unnatural, and bearing on its face, as well as when considered in connection with the actual course of events, convincing evidence of its own insincerity.

If this had been their real purpose, it is difficult to account for the solicitude with which they sought and obtained, at the outset, such careful legal advice on the various points which must be observed in obtaining title to government lands through, or from entrymen, and it is difficult to understand why they proceeded immediately and continuously to acquire not only the full quota of lands which Sweet and Steunenberg had agreed to procure for them to begin with, but all the other lands on Grimes Creek and Moore's Creek which they acquired through entrymen during the spring and summer of 1902.

It is difficult to understand, also, if such was really their intention and purpose, why they allowed nearly two months to elapse after Downs' exploration and cruise of the Crooked River country in June, 1902—to which timber both Barber and Moon say their attention was called almost from the very first, and at least as early as May, 1902, when they wrote Mr. Carson about it, and gave general instructions, as Mr. Barber says, to have it cruised,—without taking definite steps immediately to “lay scrip” on this very desirable timber. And, even if this delay could be explained, (and it is not) it is impossible to understand why so sagacious a man as Mr. Barber should not have taken prompt measures to forestall the location of entrymen on any further portions of this tract, when he made his trip through the timber with Downs early in September, 1902, and learned, as he must have done,

that several entries had already been made there, in the latter part of August, through the solicitation and instrumentality of his guide and companion on that trip,—Mr. Downs.

If there is any shadow of truth or plausibility in the contention now put forward, that the first lot of entrymen in the Crooked River district, whose locations were filed between August 27 and October 17, 1902, were really hostile to the defendants, or were proceeding independently of them, and that great difficulty was experienced in “bringing them into camp” and securing their claims a few months later; and especially if there is any sincerity in the assertion that Mr. Kinkaid—whose faithful loyalty to “the enterprise and venture,” not only of Sweet and Steunenberg, at the outset, but of Barber, Moon and Steunenberg throughout the summer of 1902, is evidenced on almost every page of the record—had turned traitor, and had formed a combination among the entrymen (all of whom had been solicited and located by the same soliciting and locating agents, Wells and Downs, who had faithfully served “the enterprise and venture,” thus far), it staggers the imagination to attempt any explanation of the fact that the still further acquisitions in the Crooked River country, which Mr. Barber’s letters, and his testimony, show to have been determined on in the early part of 1903, provided they should secure the desired millsite, (also through the instrumentality of these same discredited, disloyal and suddenly hostile agents),—should be left to blind

chance, and exposed to frustration through precisely the same depraved propensity of hostile entrymen, instead of securing it at once and forever by the location of a small quantity of the much-talked-of "scrip."

Moreover, if anyone should be credulous enough to believe that the "scripping" intentions of the defendant had been thus forestalled and frustrated, first, with respect to the acquisition of the timber lands required to be secured between the date of execution and the date of delivery of the March 12, 1902, agreement; second, with respect to the acquisition of the other lands in the Grimes Creek and Moore's Creek district referred to in the March 12th agreement, and which were in fact secured through entrymen between April 18 and August 15, 1902; third, with respect to the large body of timber lands along Crooked River (or the North Fork of Boise River) which Barber and Moon had decided to acquire as early as the spring of 1902, and which Downs had cruised in June of that year, immediately following the general instructions of Barber and Moon to that end, and fourth, with respect to the remainder of the Crooked River tract, the acquisition of which Mr. Barber says was determined on as early as January or February, 1903, provided they should secure the desired millsite, how can we be asked to believe that, after these four successive and very provoking miscarriages and frustrations of their plans, the defendants were so inconceivably lax and stupid as to permit precisely the same thing to occur again in

September, 1903, with respect to the "6-4" timber, the acquisition of which for the "enterprise" had been determined on for more than a year and the throwing open to entry of which had been so attentively watched and kept in mind?

The ingenious theory now put forward by the defendants to explain away the apparently conclusive demonstration by the facts and circumstances surrounding each of these five successive epochs of acquisition, that these parties, like men in general, intended the reasonable consequences of their acts, places too severe a strain on the imagination.

The fact remains that, whatever the original intention of the parties may have been, they did in reality (not at one time but at each of five successive epochs, and with ample time to formulate and carry out whatever plans they wished to, with respect to each successive tract) acquire in the aggregate between 65,000 and 70,000 acres of these lands, and they acquired all but 7,000 or 8,000 of them through timber and stone entries and not through the location of any kind of scrip, and the small quantity which was acquired by scrip consisted of 40-acre tracts here and there needed to round out and complete "in substantially compact form" bodies of timber,—the great bulk of which had been previously acquired through timber and stone entries.

And they did this, notwithstanding Palmer's suggestion, in March, 1902, that "scripping" the land "would cost more, but be safer" than obtaining it through entrymen.

THE ANDERSON ENTRIES.

On September 24, 1901, four days after the applications of Wells and Granger and their wives were filed, Wells procured applications for timber lands to be offered by these persons:

Arthur Anderson,
Albert P. Nugent,
James T. Ball.
Abel E. Hunter, and,
Harvey H. Wells.

All these men lived at or near Centerville, and the lands applied for by them and those selected by Wells and Granger and their wives form a body of contiguous tracts situate within three or four miles of that village.

Harvey Wells was a brother of John I. Wells and his partner in the liquor business at Centerville. James T. Ball was in the employ of the Wells brothers. Hunter operated what is called a "private hotel" at Centerville, to which was attached something in the nature of the livery business. Anderson and Nugent were laboring men, irregularly employed in neighboring mines, and occasionally doing assessment work on mining claims for themselves and others. All were poor men, and all seem to have been more or less addicted to drink; and that they had the improvidence characteristic of their type appears from the fact that, when they came to Boise to make final proof, they spent for liquor what money they had in the five or six days intervening before the date set for their proof. There is no-

where any suggestion that any of them had sufficient funds to warrant a purchase of timber land as an investment for the indefinite future, and there is abundant reason to infer that all of them expected to be aided in making entries, there being positive proof that Anderson and Nugent actually received from Wells all or most of the money used by them in making final proof.

These five entries, as will appear from the ensuing narrative, were afterwards found by the local office at Boise to be fraudulent and recommended for cancellation; on appeal to the General Land Office, they were held for cancellation; and on further appeal they were ultimately, in 1905, cancelled by the Secretary of the Interior; the three tribunals of the Land Department concurring in the finding that all the entries had been made in pursuance of an unlawful agreement with Wells for the sale of the land.

Arthur Anderson, a Swede by birth and unable to write, was 65 years old in 1901, and had been laboring in mines in the Boise Basin for 43 years. Since 1877 he had lived about three miles from Centerville, occupying a shanty upon the public land in the midst of the timber. This shanty was within 600 feet of the tract which Wells designated to be entered by Anderson and on that tract Anderson had been cutting fire wood for his personal use through a period of nearly 25 years. No one had ever intimated to Anderson that he needed title to the land for the sake of taking wood from it, or offered any objection to his use of the tract for that purpose, or suggested

that there was any danger of the land's being taken by anyone else. Until a few days before making his application, he had never heard of the timber and stone land law. When first addressed by Wells on the subject of taking a tract of timber land, Anderson had less than \$300 (pp. 2587-2633).

To this man Wells proposed that, in consideration of the payment of \$25, Anderson would be located upon a tract of timber land. In his testimony occurs the following:

"Q. What did Mr. Wells say to you about it?

"A. Well, he said—well, he wanted me to take up a claim.

"Q. Why was he interested in your taking up a claim?

"A. Because he wanted to show me a claim. * * *

"Q. And did he tell you he would charge you a locating fee?

"A. Yes, sir.

"Q. How much was that to be?

"A. He charged me \$25, but he only got \$20 of me. * * *

"Q. Did he give you a description of the claim? Did he give you the numbers?

"A. Yes, sir.

"Q. And where did you take the numbers?

"A. Well, close to where I am living, so he didn't have much trouble to show it to me." (pp. 2588-2589).

Anderson knew that all the land around there was vacant, there having been only two or three claims taken up. (p. 2627).

Anderson had lived in these woods 37 years before Wells had come to the region and had lived for 24 years within 200 paces of the tract for pointing out which Wells charged \$25, having for that period used as his private woodyard, without paying anything to anybody, the very land upon which Wells located him for a substantial fee.

That there was, before Anderson made his application, if not an express agreement, at least a distinct understanding between him and Wells, that Wells should advance the money for final proof and that Anderson should there after convey the land to some undisclosed principal for whom Wells was acting, and that Anderson's remuneration should be about \$250, is the necessary inference from the transaction as stated by Anderson, and even from the account given by Wells himself. Anderson, besides having no conceivable motive for going to the expense and trouble of buying land which was practically his, had not sufficient money to pay for the tract; and the money was in fact supplied by Wells (pp. 2591-2592). Anderson knew that Wells was unable to buy the land from him, and would not have credited Wells' promise to that effect had Wells undertaken to do so (p. 2616). After making final proof with the money supplied by Wells, Anderson went to the office in Boise of John Kinkaid, who was Wells' attorney, with whom Anderson deposited the

receipt issued by the land office and from whom he received \$137.50 in cash and the promise of \$100 additional when the title should be perfected (p. 2619). Upon his homeward journey, being then sober, Anderson met a friend to whom he confided that he would not do again what he had done, because he had been obliged to lie throughout (p. 2607). About a year afterwards, the entry being under investigation by a special agent of the Interior Department, Anderson executed an affidavit in which he swore that he had acted in pursuance of an implied agreement to sell at the direction of Wells (p. 2600).

Albert P. Nugent was, in September, 1901, a laborer in a mine near Centerville, and did not have so much as \$400 (p. 2715). He was solicited by Wells to make an entry of timber land, and, in consideration of \$20, Wells indicated to him from a distance a tract of such land. Nugent never went upon the tract designated, but took the description given by Wells and made application for the land described.

In answer to this question:

“And you thought it was worth \$20 to pay him for pointing out a tract of land at a distance?”

Nugent said:

“Not exactly that, but that was to locate the piece of land, that I would know what to file on.” (p. 2637).

Nugent in this case testifies positively to an agreement, made before application, to transfer the land

to Wells for the sum of \$250 over the cost of entry. He affirms the statements made by him in affidavit executed in 1902, which reads in part as follows:

“On the 24th of September, 1901, I filed timber and stone entry No. 225, for the North half, &c. I made this entry at the request of John I. Wells, Boise, Idaho. We expressly agreed that I was to get from him, the said John I. Wells, \$250 at the time I made proof for making the above entry, and it was expressly agreed that the said John I. Wells was to pay all the expenses of making entry and purchasing the land.

“I went to John I. Wells’ office and he gave me \$412.50 to purchase the land with at the time of making proof, and the land office fee on the day I submitted proof. I made this proof and used this money that was given me by John I. Wells. I took the receipt I got from the receiver of the United States land office and gave it to John Kinkaid, Boise, Idaho, who gave me \$137. The said John Kinkaid then informed me that I would receive the balance, \$100, as soon as I got a patent for the land and made a transfer of the same. * * *

“Until the time I made proof I did not know that John Kinkaid was interested in the scheme; but during the above transactions neither John I. Wells or John Kinkaid made any attempt to disguise the fact that they were interested together in managing a large timber

land deal and securing people to make entries and paying them for doing so." (pp. 2657-2658).

In his testimony Nugent repeats these statements and amplifies upon the details of the transaction. He came to Boise for the purpose of making proof in company with Anderson, and Ball, Hunter and Harvey Wells arrived about the same time. The party looked up Wells and asked him for the money. Wells told them it had not yet arrived, and on the following day told them the same thing. In consequence they were unable to make proof on the day advertised, and were delayed several days, most or all of the parties improving the opportunity by having a "good time" and spending what money they had (pp. 2646-4078). Finally Wells informed them that the money had come. He took Nugent and Anderson to Kinkaid's office and they were there given enough cash to pay for their lands. Nugent was cautioned by Wells to swear at the land office that he had earned the money by his own labor (p. 2647), which direction Nugent followed. Afterwards Nugent returned to Kinkaid's office and was paid \$137.50, with the promise of \$100 additional upon the issue of patent.

Ball, Hunter and Harvey Wells, the remaining members of this group of applicants, were not examined in this cause, the two former not being found. For obvious reasons, the Government did not care to call Harvey Wells, and for reasons satisfactory to themselves the defendants did not do so.

It sufficiently appears, however, that these persons made their entries under the same agreements with John I. Wells which obtained in the other cases, and the proceedings in each of these cases followed substantially the same routine as has been indicated in respect to those others.

On December 10, 1901, the day on which final proof was made in the five Anderson cases, Kinkaid drew a cheque upon his bank in Boise for \$2,000.

These five entries, with others, were in 1902, reported adversely by the special agent of the General Land Office who had taken the affidavits above mentioned, of Anderson and Nugent, and charges against the entries were formulated in accordance with the facts embodied in those affidavits. Upon these charges a hearing was demanded and was had in the local land office in December, 1903.

At this hearing the Government was represented by Louis L. Sharp, the special agent before mentioned, and Milton C. Cage, a local attorney of Boise, who was employed by Mr. Sharp as associate counsel. The defendants were represented by Harry Worthman, an attorney practising at Boise, and Frank Martin, who had formerly been attorney general of the State of Idaho, both of whom appear in other phases of these transactions.

Nugent made default. The other cases were consolidated under a stipulation that all the evidence should apply to each case. Upon the evidence taken the register and receiver of the local land office at Boise recommended all the entries for cancellation

upon a finding that the entrymen had made their initial applications under and in pursuance of antecedent agreements with John I. Wells by which the lands were to be transferred to some person to be designated by him in consideration of \$250, or thereabouts, to be allowed to each of the entrymen as compensation for his services. (pp. 3004-3005).

Upon appeal to the Commissioner of the General Land Office, the entries were by that officer held for cancellation; and upon further appeal to the Secretary of the Interior, the findings of the lower offices were confirmed and the entries cancelled (pp.).

Anderson's expenses, amounting to \$80, incurred while in attendance upon these cases, were paid by Wells (p. 2595).

The decision of the Secretary of the Interior adverse to the entries of Anderson, Hunter, Ball and Harvey Wells, was rendered on May 24, 1905, and was promulgated by the Commissioner of the General Land Office on June 3, 1905. Under the rules governing practice in the Interior Department—of which the courts take judicial notice: *Caha vs. United State*, 152 U. S.—the entrymen were allowed 60 days in which to move for review of the Secretary's decision, during which period the cases remained open and cancellation was postponed.

Frank Martin, the active attorney for the entrymen in the Anderson cases, had, in 1903, recently retired from the office of Attorney General of the State, and was then, and still is, engaged in the practice of law at Boise. He was retained in these cases by John

T. Wells, who brought the entrymen to him. Both Anderson and Nugent testify that they did not employ Martin or promise to pay him any fee (pp. 2596-2653). It appears that neither of them had any considerable conference with Mr. Martin before the trial, but on one occasion during the proceedings Martin charged Anderson that he must stay with the land, now that he had taken it (p. 2596).

Mr. Martin appears to have been on terms of close friendship and associated in sundry business affairs with Governor Steunenberg, the Governor having been, when visiting Boise, in the habit of using Martin's office for the transaction of his business and the deposit of his papers (pp. 3167). After Mr. Martin was summoned by the prosecution to testify in this cause as a witness for the Government, he had, on the day before he was to testify and while under the Government subpoena, a conference with the defendants' counsel, at which various matters of Mr. Martin's anticipated testimony were gone over. (p. 3165).

Mr. Martin and his wife, Ella L. Martin, in September, 1903, made entries of timber land in Tp. 6 N., R. 4 E., and they conveyed the tracts entered to the Barber Lumber Company (p. 2814-3285). It appears also that Mr. Martin has been indicted, along with Barber, Moon and others, on account of the transactions now in question (p. 3950).

About the date of the Commissioner's aforesaid letter of promulgation, and in the same month of June, application to enter the land covered by the Anderson entry was made at the Boise land office by

Leon S. Simpson; application for the Ball tract was made by Mrs. Eleanor Phelps; application for the land sought by Harvey Wells was filed by Mrs. Mary J. Martin; the wife of Frank Martin's brother, Thomas; and application for the Hunter claim was offered by Mrs. Nettie Weston, the daughter of Mrs. Mary J. Martin and a niece of Frank Martin.

All these applications were, when first presented, denied by the local land office, obviously on the ground that the cases against the pre-existing entries were not yet closed, or, as it is expressed in the testimony, on account of some difficulty about the relinquishments.

Shortly afterwards, Frank Martin, in company with John L. Wells, went to Centerville and obtained from the entrymen papers which are designated in the testimony as relinquishments, but which were, more technically, waivers of the right to move for review of the Secretary's decision. On August 10, 1905, the register and receiver at Boise transmitted these papers to the General Land Office, and on September 6th that office closed the cases by letters to the register and receiver. Within a few days after the receipt of these letters at Boise, Simpson, Mrs. Phelps, Mrs. Martin and Mrs. Weston renewed their respective applications and, in due course thereafter, made entries of the several tracts in the Anderson group.

Simpson, who was a bookkeeper in the employ of the Falk Mercantile Company at Boise, was, in June, 1905, visited at his place of business late one after-

noon by John I. Wells, who stated that Frank Martin had a relinquishment to dispose of. Simpson at once left his desk and repaired to Mr. Martin's office. Martin said that he had left only one claim out of four (p. 2617) and that the relinquishment would cost \$100. Simpson agreed to pay this sum, returned to the Falk establishment and resumed his duties. A day or two later Simpson made the trip to Centerville, and was shown the tract formerly entered by Anderson, paying for this favor a locating fee of \$10 to Thomas Martin, a nephew of Frank Martin (p. 2617).

Simpson returned to Boise and applied to enter the land. Because the cases of Anderson *et al* had not yet been formally closed by Departmental action, his application was then denied, as were the applications made about the same time by Mrs. Martin, Mrs. Weston and Mrs. Phelps. About three months later, in September, 1905, Simpson was notified by a telephone message from the office of Frank Martin to go to the land office and renew his application. At the office he found Mrs. Martin and Mrs. Phelps, who were in like manner renewing their applications.

Simpson was a married man, and, at the time of his resolve to enter a tract of timber land, knew of no market for such land. He paid \$100 for the relinquishment of an entry which had been ordered cancelled by a final decision of the Interior Department, \$10 for a location fee, and \$412.50 as fees and purchase price. The cost of his excursions to Centerville does not appear; but, as that was a three days'

journey, it is safe to assume that Simpson's total cash outlay on account of this entry did not fall short of \$550, and was probably nearer to \$575. He testifies that he drew the money from the store; and that there were no arrangements for a sale of the land (p. 2621).

Mrs. Weston acted in this matter upon the suggestion and under the direction of her father, Frank Martin's brother. The father negotiated the purchase of the relinquishment from Frank Martin, paid the cost of location and the charges at the land office, and arranged the sale to Frank Martin. Mrs. Weston did not advance any money, and the cheque for \$250 which her uncle Frank Martin gave her on her signing of a deed in his favor, was the only thing of a pecuniary nature which passed through her hands in the whole course of the transaction (p. 3069).

Mrs. Martin, in like manner, did not participate in any of the financial details of her entry, the transaction being conducted by her husband, Frank Martin's brother, who collected the purchase money and put it in bank. Mrs. Martin did not see the cheque by which she was paid, and the only money which she ever received from the transaction was that which her husband, afterward, from time to time, gave her in such sums as she required for domestic needs.

Mrs. Phelps was and is the wife of Edward J. Phelps, who acquired and conveyed to the Barber Lumber Company the land before included in the homestead entry of Henry A. Snow. Snow's entry

had been contested, and in the contest proceedings Snow was represented by Mr. Frank Martin. On March 7, 1905, a few weeks before the Department decision in the Anderson cases, then on appeal, Snow filed a relinquishment upon which his homestead entry was at once canceled. A few days before Thomas L. Martin, a nephew of Frank Martin, and Phelps' partner in the real estate business, had suggested to Phelps the desirability of taking the Snow tract under the timber land law. Phelps agreed to the proposition, and on the 3rd of March went to the land, in company with Thomas B. Martin, Frank Martin's brother, who pointed out the tract to Phelps for a fee of \$15 paid by the latter. Returning to Boise on the 5th, Phelps filed an application on March 6, 1905, and made final proof on May 13th. He conveyed the land to the Barber Lumber Company on July 28, 1905, after Mrs. Phelps had made her first application for the Ball tract, and before she had been allowed to enter.

The several tracts entered by Simpson, Mrs. Phelps, Mrs. Martin and Mrs. Weston were afterwards conveyed by those persons by several deeds to Frank Martin, who thereupon executed a deed by which the four titles were conveyed to the Barber Lumber Company.

The tract entered by Nugent, and afterwards abandoned by him, was, after cancellation of his entry, entered by one J. T. Lietzchke, who in due course conveyed the land to the Barber Lumber Company through A. E. Palmer as intermediate grantee.

These five tracts, the title to which was originally sought in September, 1901, were therefore, finally, after the lapse of five years, acquired by the Barber Lumber Company.

Some of the other incidents of this proceeding, and some of the persons concerned therein, may be advantageously considered in this connection.

Mr. Cage, who had been employed by the Government to assist Mr. Sharp in the prosecution of these cases, was, early in January, 1904, a few days after the hearing in the local office and while the cases were yet undecided by the register and receiver, retained by the Barber Lumber Company upon an annual salary of \$500. In this matter the company acted through G. D. Hoseley, a logger in its employ, of whom fuller mention is later to be made, and Hoseley paid Mr. Cage \$250 on January 6, 1904. In the latter part of the year, Mr. Chapman, who came to Boise to take charge of the company's affairs, sought to ascertain for what purpose Cage had been retained, but was, and has as yet been, unable to learn of any business done by him for the company. Mr. Chapman was, however, informed that Mr. Cage had been retained for the year, and accordingly paid him an additional \$250 as the balance of the agreed annual salary (pp. 2891-2892).

Mr. Worthman was employed in these cases by John Kinkaid, the entrymen appearing to have had no voice in the selection of their attorneys beyond acquiescing in what was done for them by Kinkaid and Wells, and assuming no liability for any fees.

Anderson was first informed of the charges against his entry by Norman H. Young, who, professing to act on behalf of Wells, asked whether Anderson would authorize Worthman to represent him (p. 2625). Nugent was advised of Mr. Worthman's employment by a letter from Wells, dated December 26, 1902, in which Wells said, *inter alia*:

"I will have my attorney look up the matter, and I think you had better have him fight the thing for you. Birt, I will stay by you in this matter and you will get your claim. I will let you know the steps to take in a day or two, so say nothing to no one and burn this letter." (p. 2663).

Some months before his employment in these cases, Worthman, having observed that many timber land entries were being made in the Boise Basin, applied, in the early part of 1902, to John Kinkaid for a location. Kinkaid said that there were left only three such claims, which were not very good, but that Worthman might, if he chose, go up and look at them (p. 429). A few days later, Kinkaid brought Downs to Worthman, and the latter, with a friend, W. S. Walker, went with Downs to Idaho City, and were thence taken by Downs to some vacant tracts three or four miles beyond. Worthman and Walker accepted and afterwards made entries of the tracts indicated, Worthman's final certificate being dated June 19, 1902, and Walker's on the day following. On **May 16**, 1903, both entrymen, by deeds in the hand writing of Kinkaid, conveyed to

A. E. Palmer, from whom the titles passed to the Barber Lumber Company.

Mr. Worthman was paid by Kinkaid, for his services in the Anderson cases, \$50 in cash, and was given Kinkaid's promissory note for \$100. (pp. 439-440.)

Kinkaid stated, at the time of giving his note, that he expected to get the money to pay it from Governor Steuenberg. (pp. 440-2854).

Governor Steuenberg was then, in December, 1903, acting for the Barber Lumber Company in the acquisition of timber lands in Idaho, having in March, 1902, according to the defendants' testimony, contracted to obtain for the company 25,000 acres of such land. The cheque with which Hoseley retained Mr. Cage on behalf of the Barber Lumber Company was drawn by Steuenberg. On July 6, 1904, Steuenberg paid Mr. Frank Martin \$100 by a cheque, the stub of which in Steuenberg's book indicates that the payment was "For Atty. fee part acct contest cases in Land Office." (p. 2857). In January, 1904, while the Anderson cases were pending on appeal, Steuenberg bought a copy of the transcript of testimony taken in those cases, for which he paid \$193.65. (pp. 3150-3152).

Barber testified that none of their lands came through the entries of Anderson, Hunter, Harvey Wells, Ball or Nugent, and that at the time he and Moon entered into the agreement with Steuenberg and purchased Sweet's interest he did not know that said persons had made entries, or anything in con-

nection with them, and that he had never heard of those entries or the contests in which they were involved before he saw it charged in the indictment returned against him and Moon, (which was in the spring of 1907), and that neither he nor Mr. Moon nor the company was in any manner interested, financially or otherwise, in said claims (pp. 4487-4488). And Moon testified that the first time he heard of said entries or the contests or the appeals in the contest cases was the reference made to them in said indictment (pp. 4618-4619).

Though we have heretofore in this brief and in Appendix A, attached, counted these five entries as claims which Sweet and Steunenberg might have controlled in March, 1902, if what Barber and Moon now say is true, the number of claims for which they bargained with Steunenberg would be still further reduced five claims, or 800 acres. However, under the next heading in this brief it is made clear, from the extent to which Barber and Moon exercised themselves relative to said entries, that they had a very considerable knowledge of and interest in them.

The lands in this cause are divided more or less distinctly by the natural features of the region into three bodies, and the clearness and convenient arrangement of the present narrative will be subserved by recognizing such a division, which is roughly indicated thus:

1. The Boise Basin, called in the testimony and in this brief the Basin lands, lying in townships 6 N.,

R. 5 E., 6 N., R. 6 E., 7 N., R. 4 E., and 7 N., R. 5 E.

2. The Crooked River lands, and North Fork, lying in townships 6 N., R. 8 E., 7 N., R. 7 E., and 7 N., R. 8 E.; and

3. Township 6 N., R. 4 E., which is segregated because the entries made therein constituted a distinct transaction for the purposes of this brief.

It will be observed that the interest of Barber and Moon, and afterwards the Barber Lumber Company, in the transactions taking place after April 10, 1902, is not sought to be denied, but is, in great part, shown by the evidence adduced by the defendants.

THE SUSPENSION OF THE ENTRIES.

In the early part of the year 1901, before the commencement of the operations hereinbefore recited, the General Land office had found reason to believe that attempts were being made to acquire timber lands along the Payette River (2977) in the Boise land district by fraudulent entries. None of the Payette River entries are involved in this case.

By letter dated July 13, 1901, the Commissioner of the General Land Office stated this fact to the local officers at Boise, and directed them to exercise special caution concerning applications to purchase timber land, and to issue no final certificates in such cases, but to transmit the proofs to the General Land Office for further examination. (p. 2975).

The local land officers construed this caution as ap-

plying to all entries thereafter filed in the Boise Land Office. Accordingly, in all the cases hereinbefore mentioned, in which proofs were offered after the date of the Commissioner's letter, and before the month of April, 1902, the final proofs were suspended, only "temporary receipts" being given to the applicants for the moneys deposited by them, and the entry papers filed were sent to Washington.

Though Barber testified that Steunenberg, when he came to Eau Claire in March, 1902, represented that final receipts had issued to several thousand acres of timber land in Boise Basin which he and Sweet controlled, (p. 4375), and both Barber and Moon testified that they knew nothing of the suspension of entries under the Timber and Stone Act in Idaho until some time in June, 1902, and by telegram of April 7, 1902, Moon advises Palmer that he understands "that titles have been perfected in a legal way to certain lands in certain parties, final proofs made and approved by the local officials of the United States Land Office; final receipts issued or will issue upon payment of certain sums to the Government, and nothing remains to be done but patents to issue," (p. 4432), Palmer was directed to verify Steunenberg's statements and representations before delivering a copy of the contract of March 12th to him; Barber testified that "Whether the contract was effective or not depended entirely upon what Mr. Palmer found out with reference to his (Steunenberg's) representations, and the contract was not to go into effect until

Mr. Palmer had time to investigate the representations of Mr. Steunenberg," (p. 4706).

Palmer was at Boise between March 28th (4419) and April 2d, 1902, (4425) for the purpose of verifying Steunenberg's representations, and seeing to it that the conditions precedent had been complied with.

It was only from the records of the land office that he could have learned with certainty whether or not the entries which Steunenberg had contracted to deliver to Barber and Moon had been made, and to what extent final proofs had been made upon them, and whether other timberlands, of the quantity called for by the contract, remained open to entry, or, (assuming that the location of "Scrip" was seriously contemplated, at that time, and we think the evidence hereafter referred to, shows that it was not) to the location of "Scrip."

These records showed that no final certificates had been issued at that time for any of the entries in the Boise Basin (which could have been referred to by Steunenberg) and Palmer must have learned that merely "temporary receipts" had been issued by the Receiver for such moneys as had been paid in at the time of making final proof on any of these entries.

No letter or telegram is produced which shows clearly whether Palmer informed Barber and Moon specifically as to this, but in the nature of things he must have done so and the evidence does show that he wired them twice that "the only title acquired so far is Receiver's Receipts" (from Spokane, April 4.

p. 4429) and "You understand the only title you get pending patent is a Receiver's Receipt," (from Spokane, April 5th, p. 4429) and it shows (pages 4430-31) that Barber and Moon understood they were getting title only on some kind of Receipts from the Receiver. Mr. Moon says, **final receipts as he remembered it**, (p. 4430) and they again consulted Mr. Frawley on this feature, before instructing Palmer to close. (4431-4434). The second letter of instructions prepared by Frawley was then forwarded, April 7th, and Palmer waited until its receipt, April 10th, before closing the deal. Palmer was evidently "wired" to await these instructions. (4431).

Though bearing but in small part upon the matter of suspension of entries, it might be well to observe at this point that Wells stated to one Junius Wright that Kinkaid, while a member of the legislature in 1901, had conceived the plan of locating people on timber claims in the Boise Basin (p. 3567); that Palmer arrived at Boise March 28th, 29th or 30th, 1902, and went into the timber March 31st, 1902 (pp. 4419-4422); that Kinkaid met Palmer, and Thornton might have been present (p. 4344); that Palmer's mission at Boise on that occasion was to verify Steunenberg's statements, before the delivery of the contract, and the contract was not to be effective until he had an opportunity to learn whether Steunenberg's representations were true (p. 4706); that during the time that Palmer was at Boise on this occasion, Patrick Downs performed some ser-

vice for him for which he was paid by Palmer \$17.00 April 2, 1902 (p. 5240); that Palmer had returned to Spokane, Washington, by April 3rd, 1902, and, considering the time consumed in travel into the Boise Basin and back to Boise and then to Spokane, Palmer could hardly have been in the timber more than one day; that on April 3rd Palmer, at Spokane, telegraphed Moon, at Eau Claire, "shall I close and send Thornton to estimate?" (p. 4426); that Palmer, at Spokane, on April 4th (p. 4428) gave Thornton a letter to Kinkaid, at Boise, and Thornton proceeded to Boise and saw Kinkaid, and "he (Kinkaid) just give me the plots of this land I was to look over and I went right into the woods and started to work" (p. 1404), and " * * * those plots that Mr. Kinkaid gave me I supposed they was claims that was taken" (p. 1409), and while in the woods Thornton met Downs, who "was locating people on some of those lands" (p. 1408); that Thornton, reporting to Palmer from the timber region April 19th, 1902, said, "you will find there is some difference in the land I have located and what you got on them plats. I located the lands he (Kinkaid) give me first, but he was up here this week and there was quite a difference, but he said it would be all right, because they would all have to be located, if there is any timber on it" (pp. 4762-4763); that Kinkaid left Boise for Thunder Mountain April 16th, 1902, and remained until June 1st; and that Palmer joined Steunenberg at Boise on April 6th, and was ready to close with him on the 7th (pp. 4428-4429-4430).

In view of these facts, the conclusion is irresistible that, as Steunenberg was at Boise on Thornton's arrival, and instead of reporting to him he repaired to Kinkaid's office, Palmer had arranged this meeting between Kinkaid and Thornton while at Boise two or three days before Thornton reached that place and that it was Kinkaid and Downs who verified Steunenberg's representations, and made plain to Palmer how the remaining acreage was to be acquired.

Again, Wells testified that practically all the persons he had located on timber claims prior to Christmas, 1901, about 40, (p. 413) *papers pur uuy of aune* (2) that they could not raise the money with which to make proof, and asked if he could find someone that would make them a loan for that purpose (p. 4081). Upon Wells' request Sweet agreed to advance through Wells the money for said entrymen to make proof, which afterwards he did (p. 4082).

In a few instances Wells took the entrymen's note for the amount of the money thus furnished, in others the Receiver's Receipt was turned over to him and in the remaining cases no note or other evidence of indebtedness was obtained (p. 4086).

Wells further testified that "The folks I had loaned the money to, Mr. Sweet's money, I was requested some time in June, 1902, by Mr. Steunenberg to let him know what parties I had loaned money to, and he said he wanted me to look out for that and collect the money that I had loaned to the applicants or people I had loaned to. * * *" (pp. 4092-4093).

The amount advanced by Sweet was deducted by Pritchard in the final settlement with the entrymen, and Wells says this amount was turned over to him and he in turn paid the same over to Steunenberg (p. 4094).

On March 25, 1902, Sweet, writing from New York to Steunenberg at Caldwell, Idaho, said:

“Now, Governor, if I must go back why I’ll go, but I would not go back for two or three thousand dollars now for a week or two. I cannot see how only to say yes to what I have written. I can mention the amounts of money I think I’m in which you can see **Mr. Kinkaid** about and compare notes. The first amount is \$12,200.00 the second is \$7,500.00 note that we are together on and the third is the \$6,000.00 draft I sent you and the fourth is the \$3,000. that I wired to Kinkaid, to draw (I do not know whether he drew it or not.)”

Deducting from the aggregate of these amounts Steunenberg’s indebtedness in said note, and assuming that Kinkaid did not draw the \$3000 we have the amount upon which the settlement with Sweet was made, to-wit, \$21,950. This letter in due course reached Steunenberg the day Palmer arrived at Boise.

As Steunenberg was to “compare notes” with Kinkaid to learn the exact amount that Sweet had advanced, and Palmer was to verify Steunenberg’s statements, it seems conclusive that Palmer must have gotten his information on that subject from

Kinkaid; and also the names of the entrymen, to whom the advances had been made, from Kinkaid and Wells.

In April, 1902, by letters dated on the 10th and the 22nd of that month, (the former date is also the one on which the Steunenberg-Barber-Moon contract became effective), the Commissioner returned to the Boise Office all or most of the suspended cases, stating that the proofs appeared on their face to be fair, and directed the local officers to re-examine the same, consider any information which had come to their knowledge during the suspension, and in every case in which they should be satisfied **beyond question** of the claimant's good faith, to issue final receipt and final certificate, (pp. 2982-2987). The Boise Basin cases thus returned numbered 60, excluding the entry of Dora Burns, which had been, or was afterwards relinquished and abandoned.

At the time when these cases were returned, the local officers at Boise strongly suspected that the Basin entries were fraudulent. To this suspicion they had been led, in part by information coming to them since the transmission of the proofs to Washington, but chiefly by observation of the unusual number of such entries being made without any assignable reason. Particular grounds of suspicion were: first, that there was no market and no demand for timber lands; and, second, that the applicants were all people of little or no means, who were unable and would naturally be undisposed to buy such

lands for investment, (pp. 2996, 3028, 3029).

On these accounts, being, as Mr. Garrett, the then receiver, expressed it, "satisfied that there was a nigger in the wood pile," the local officers, on May 9, 1902, reported to the Commissioner that they were not satisfied beyond question that the entries were **bona fide**, and requested further instructions, (p. 2995). At the same time, or thereabouts, they also requested that a special agent of the General Land Office be sent to investigate the cases in the field, (p. 2995).

About May 1, 1902, (3001), E. J. Dockery, an attorney of the Boise bar, who had been to Washington and there endeavored to persuade the General Land Office to release the suspended entries in the Basin, called upon Garrett, the receiver, in Boise and asked if instructions had been received to issue final certificates upon these entries. Upon being answered in the negative, Mr. Dockery declared that he knew that such instructions had been received, and demanded to see the correspondence. This demand being refused, he returned the next day with authorization from several of the entrymen to act as their attorney, and again insisted upon seeing the correspondence, (p. 3001). Mr. Dockery also appeared on another occasion, just after Dora Burns had abandoned her entry and withdrawn her money, and made inquiry about that matter, (pp. 3051, 3052).

Mr. Dockery and his wife are among those persons who afterwards made timber land entries in the Crooked River region, and sold the lands thereby ac-

quired to the Barber Lumber Company, through Kin-kaid, (pp. 5349, 5350).

Shortly after the visits of Mr. Dockery to the land office, another attorney, George M. Parsons, an intimate friend of the receiver, called upon Mr. Garrett, and said that he "represented the interests involved in these entries." He further suggested that Garrett would get into trouble if he should persist in holding back those cases; and he then exhibited a letter from Fred T. Dubois, then United States Senator from Idaho, in which Senator Dubois, writing from Washington, stated that the Commissioner of the General Land Office would take drastic action if Garrett should continue to stand in the way of the entries, (pp. 3002, 3335, 3336).

For services as attorney, Mr. Parsons was paid by the Barber Lumber Company a fee of \$400.00, (Plaintiff's Exhibit No. 143 S.) (p. 5247).

Both of these attorneys called after the Commissioner's letter of April 22, and before the receipt of the Commissioner's subsequent instructions.

On June 6, 1902, Mr. Binger Hermann, then Commissioner of the General Land Office, wrote to the Boise office a letter, in which, after reciting the correspondence above stated, he thus instructed the local officers:

"I realize the fact, that, in the examination of timber and stone final proofs, the local officers cannot, in all cases, be convinced beyond the shadow of a suspicion of the bona fides of the claimant, and you will not therefore, sus-

pend the final proof where the necessary cross-examinations have been made and other instructions of this office relative to taking final proofs complied with, and everything appears regular and correct on the face of the proof, unless you have good and substantial grounds to believe that the entry should not be approved, when you will refer the case to the special agent on duty nearest to your office for investigation, stating your reason for desiring an investigation of the entry. * * *

“You are accordingly directed to proceed at once with the examination of all timber and stone final proofs in your office, in accordance with the foregoing, so as to avoid further delays in approvals and to refer such of them as to which there exist good and substantial reasons for investigations, to special agents, for early action.” (pp. 2998, 2999).

In pursuance of this peremptory direction, the local officers proceeded to issue certificates upon most of the theretofore suspended entries. Before doing so, however, they submitted to the entryman in each case to file an affidavit of non-alienation, that is, an affidavit to the effect that he had not sold or agreed to sell, or mortgage, the land embraced in his entry since the date of his final proof. All of the parties whose entries had been suspended, including all of those who had made entries in the Basin prior to July, 1901, made and filed such affidavits.

If, as counsel for the defendants suggested in the examination of several witnesses, the acceptance of final proof money from Wells was in pursuance of a sale agreed upon, or was a loan to be secured by the deposit of the receipt in the nature of a mortgage, then in every one of these cases the non-alienation affidavit was an additional fraud in the procurement of the titles.

Before the receipt of the Commissioner's order releasing the suspended entries, that is to say, about the middle of May, 1902, in response to the request of the local officers, L. L. Sharp, a special agent of the General Land Office arrived at Boise (p. 1023), and entered upon an investigation of the Basin entries. By the time the letter of June 6th reached Boise, Mr. Sharp had discovered and reported such facts that the local officers felt justified in holding up about 12 cases, as being cases in which there were what the Commissioner had called "good and substantial grounds, for rejection, (p. 2996). Among these cases were those of Anderson, Nugent, Ball, Hunter, Harvey Wells, Jennie Wells, John I. Wells, Homer Granger, Oral Dye, and some others. It was this action which led to the hearing and ultimate cancellation of the Anderson cases; the entries of Wells and his wife are still suspended.

Upon most of the remaining entries then pending final proof certificates were issued, beginning in June, 1902, the 12 cases just mentioned being the only ones in which the local office had any adverse information of a definite and tangible nature (p. 3025).

In some of these cases, however, that is to say, in about eight cases, additional to the 12 already mentioned as further suspended, the local officers continued to hesitate; and the delay thereby caused in these cases, as well as in the dozen in which the suspension was continued, became the subject of much anxious activity and solicitous correspondence on the part of Messrs. Barber, Moon, Steunenberg and their associates and political friends.

In June, 1902, Mr. Moon, of the Eau Claire firm, visited Boise, and spent some time in looking over the timber region which his firm had undertaken to exploit, and acquainting himself with the situation (pp. 4466, 4547). On this occasion, if not before, he learned that "some order had been made directing the issue of titles, patents" (pp. 4452, 4453).

Thereafter the Eau Claire firm began, as they testified, to have deeds made conveying the lands entered, to A. E. Palmer (p. 4453). On July 17, 1902, a few days after receiving a telegraphic message from Steunenberg, "Situation here most satisfactory, and party recalled," Moon advises Palmer: "I don't think it would be advisable for us to have these deeds go on record for the present" (p. 4471).

THE ATTEMPT ON THE SPECIAL AGENT.

Louis L. Sharp, the special agent heretofore mentioned, was, in 1902, twenty-five years old, and had been in the service of the Interior Department since August in the year preceding. His father was a member of the legislature of the State of Washington, and

young Sharp had received his appointment at the instance of Mr. A. G. Foster, then United States Senator from that State (pp. 1023, 3740).

Sharp arrived at Boise about the middle of May, 1902. (p. 1023), under instructions to investigate the Basin entries. He entered upon this duty with such zeal and such effectiveness that, within about a month, certainly within six weeks, he had secured evidence which caused great uneasiness in the minds of the persons who were then about to incorporate as the Barber Lumber Company.

In the latter part of June, 1902, Steunenberg went from Boise to Eau Claire, and reported to Barber and Moon "that there was a general suspension of timber and stone entries," and that Sharp had been sent from Washington. Steunenberg further stated that he was going to Washington to find out why the special agent was at Boise and "when he would be likely to be recalled" (p. 4472).

On June 28, 1902, Barber wrote from Eau Claire to the Hon. John C. Spooner, the United States Senator from Wisconsin, this letter:

"June 28, 1902.

Hon. John C. Spooner,
United States Senator,
Washington, D. C.

My dear Sir: . .

In looking around for localities for securing timber for lumber operations when our Wisconsin timber was exhausted, we hit upon a

lot of timber called yellow pine in Boise County, Idaho. In this locality formerly, much placer mining had been done, but these mines were worked out and a lot of these miners were left without employment. Some time before we began the investigation of that country, a large part of these miners saw fit to locate claims on Government land under the timber and stone act. Of course they have selected the best timber in their localities and we are anxious to buy them out as soon as they secure title to their land. These titles are long past due and in Boise land office, and are held up for some reason. Some time ago a general order was made to investigate all claims on Government land, before further patents were issued, and this investigation was started in Boise County. The claimants stated their case to Senator Du Bois and he explained it to the Secretary of the Interior and a peremptory order was issued through the Commissioner of the General Land Office to the local office at Boise to give final receipts and issue patents in the regular way. The order didn't include the stopping of the investigation and so long as this continued the local land office declined to issue final receipts and patents, despite the order. This investigation is in the hands of one L. L. Sharp and he has got hold of 2 or 3 disgruntled miners, who thought that they would have secured claims taken by others or

could not raise the necessary location fee and from them secured affidavits charging fraud, etc. These parties I believe, are called Joe Poncho, Nels Botcher, and one Pettis.

"We would like to have this matter settled at once by telegraph if possible so that we can either scrip these claims or buy them of the claimants and go on with our plans, and to this end we would like to have the Secretary order this man Sharp to report in Washington, D. C., or anywhere else out of the Boise District and let his former order issued through the general land commissioner be carried out. If you will help us out in this matter you will place us under great obligation to you, but considerable tact must be used as we understand that Du Bois is a very jealous man and if he learned anything was being done except through him, he might throw claimants into the air. I want to assure you that so far as our interests in or knowledge of the matter is concerned, everything is perfectly straight. Kindly let me hear from you at your earliest convenience.

"With kindest regards, I am,

Very truly yours,

JAMES T. BARBER."

(pp. 4820, 4822).

Mr. Barber testified that he and Mr. Spooner had been personal friends for twenty years or more; that

it had been his good fortune, to be able to assist in a small way in Mr. Spooner's political fights; and that Spooner has frequently referred to him as the "original Spooner man" (p. 4742).

On July 7, 1902, Moon telegraphed to Steunenberg at Boise: "Have taken up matter by letter with three parties in Washington."

The "three parties in Washington" were Senator Spooner of Wisconsin, who was addressed by Barber; Senator Allison of Iowa, who was appealed to by Mr. Carson, a resident of Burlington in that State; and "some Minnesota man," known to Mr. Macartney of Saint Paul, who was the Barber Company's attorney and a partner of Senator Clapp of Minnesota (pp. 4809, 4810).

On July 9, 1902, Barber wrote to Messrs. Clapp and Macartney, attorneys, at Saint Paul:

"I have been planning to go to Idaho the last of next month, and question whether it is advisable for you to wait until that time before making the trip yourself.

"It seems to me that our affairs are in a critical state when energy and prompt action may mean a great deal to us." (p. 4814).

On July 17th Barber wrote to Steunenberg, at Caldwell, Idaho, (he having by this time returned to Idaho, after the telegram a few days before advising that party was recalled):

"I can't close this letter without congratulating you upon the improved condition of matters in the land office at Boise (p. 4815).

Mr. Barber, when examined in this cause, was unable to "remember the particular cause for congratulations at that time," nor could he recall what was the nature of the "critical state" alluded to in his letter of the 9th, *supra*. The contemporary correspondence seems to resolve Mr. Barber's doubts on this subject (p. 4815).

A few days before July 17th, Steunenberg had telegraphed from Washington to Moon at Eau Claire:

"Situation here most satisfactory and party recalled. What is the news?" (p. 4472).

Reporting this telegram to Palmer at Spokane, on July 17th, Moon observed:

"I presume that means that the final receipts and patents on all the lands will be forthcoming at once, and you will be taking deeds. We have organized as the Barber Lumber Company at Eau Claire, Wisconsin, and think you had better take deeds from the entrymen in your name and have them recorded; then you in turn deed to the Barber Lumber Company.

"I don't think it would be advisable for us to have these deeds go on record for the present. Do you?" (p. 4471).

Steunenberg's information that Sharp had been or was to be recalled, proved to be erroneous and Sharp continued in the discharge of his duty with so much persistence that further measures were taken by those interested in stopping his activity.

Steunenberg, while in Washington, in July, 1902, met there Amasa B. Campbell, of Spokane, a mining operator, who was a friend, not only of Steunenberg, but of Palmer, and who felt under obligations to Steunenberg on account of Steunenberg's official action, while Governor of Idaho, in respect to the riots in the mining regions of that State (pp. 3850, 3868). To Mr. Campbell, Steunenberg stated his difficulty concerning the Basin entries, saying "that he was having more or less trouble in perfecting his title to that timber," and "that there was a man by the name of Sharp, a timber inspector, had been giving him a good bit of trouble (pp. 3868, 3869).

Steunenberg, then, adverting to the fact that Sharp was an appointee of Senator Foster, requested Campbell "to see the Senator, and have him (Sharp), instead of fighting him, try to help him secure this."

To this Campbell consented; he communicated with Senator Foster; and the Senator, mentioning the fact that Sharp's father was a member of the Washington legislature, agreed to have the young man call upon Campbell at Spokane "and talk this over" (p. 3869).

Before the interview between Campbell and Sharp was brought about, Steunenberg, having returned from Washington, went himself to see Senator Foster, at the Senator's home in Tacoma, Washington, and making his first visit before the 16th of August (pp. 3745, 3746). He stated to Mr. Foster that he was having trouble with some entries in the Boise Basin, and complained that young Sharp, the Sen-

ator's appointee, was making, or had made, reports adverse to the entries. He showed Foster a list of fifteen or twenty names, headed by that of Arthur Anderson, which list contained the cases causing him present concern. According to Senator Foster, Steunenberg proposed (p. 3741):

"Nothing, only that it was to be placed before Sharp in a way that he would get a fair show. He was not after——he never made any intimations that he wanted Sharp to do the wrong thing, or anything of the kind, but he simply wanted Sharp to recognize him as a fair man.

"I should not have had all this talk with him, but he was governor of the State over there and a representative man, and that is how I came to listen to him at that time" (p. 3742).

In accordance with Steunenberg's request, on August 16, 1902, Senator Foster wrote to the Commissioner of the General Land Office, asking that upon the entries included in the list of Steunenberg no action should be taken until the Senator should arrive in Washington in the succeeding November. By letter of September 2, 1902, the Commissioner promised to hold these cases "in abeyance" until November. On October 21, 1902, Campbell wrote from Spokane to Foster, making some inquiry about these cases; to which inquiry Foster, on October 27, 1902, responded by transmitting the Commissioner's letter and proposing an early conference with Campbell

for the purpose of going "over this matter in detail and in a satisfactory way" (pp. 3745, 3746, 3747).

Before this, on September 15th, Steunenberg, having about a week previously received some sort of a letter from Senator Foster, wrote to Campbell:

"I have taken the liberty to send Senator Foster's letter to my Eastern associates. * * *

"The tie-up of the twelve entries still exists and bothers me a great deal, but I have faith that, through the work of yourself and friends, we will have a solution--now that we have a pointer on the inspector and those that are responsible for his appointment" (p. 3864).

On September 19, 1902, Barber wrote to Steunenberg:

"I note contents of yours of the 15th and return the same herewith. Sincerely hope the object in view will soon be reached through the influences exerted in that direction" (p. 4816).

On October 31, 1902, Steunenberg, having evidently received from Campbell the letter written by Senator Foster on the 27th, wrote to Campbell:

Hon. A. B. Campbell,
Spokane, Washington.

My dear Friend:

Your valued letter, with enclosures, at hand yesterday. Any time you can make appointment with Senator Foster, I can come.

This feature of the timber deal is getting

into bad shape. Sharpe, the prospector, and the local land office people, have worked so secretly and used so much deception, even with their friends, that I have not been able to learn the true situation, much less do any work. If not asking too much, wish you would ask Senator Foster to hold Sharpe off until I can meet the Senator.

You had better wire me at Caldwell date of meeting.

Sincerely,
Frank Steunenberg." (p. 3865).

A few days later, early in November, 1902, a day or two before Senator Foster started for Washington, Steunenberg went for a second time to Tacoma and again interviewed the Senator concerning the Basin entries and particularly concerning Sharp's pernicious activity (pp. 3742, 3746). He had now come to the opinion that it was necessary for Foster himself to see Sharp, and requested that such an interview should be arranged. The cost of Steunenberg's trip to Tacoma was credited to him on the books of the Barber Company as of November 8, 1902. "account interview with Senator Foster" (p. 2893).

At Steunenberg's solicitation, the Senator agreed to send for Sharp. Foster telegraphed to Boise, requesting Sharp to join him, (Foster), on a Northern Pacific train upon which he was going to Washington. Sharp took the train at a station forty miles west of Spokane and rode to that city with the Sen-

mor, who did not stop at Spokane but continued his journey.

Upon Sharp's boarding the train, Senator Foster asked him "to get after the history of these matters, what was going on over there," and mentioned the visits of Steunenberg. Sharp said that he had made some adverse reports and was going to make others. Foster, admitting abstractly that a Government inspector ought to report entries as bad when they were bad, cautioned his **protege**, "But be sure that they are bad; that is all. You want to make investigations in such a way that you know what you are about" (pp. 3742-3744).

Sharp was then requested to go, upon leaving the train at Spokane, to see A. B. Campbell. This he did, and was asked by Campbell "what the trouble was with those claims" (pp. 3871, 3872). Sharp answered that there were four or five of the entries that he was unable to approve. Campbell then asked if Sharp "wouldn't go to Governor Steunenberg and tell him the facts, and not get him into any trouble." And, says Campbell, "That is about all that occurred" (p. 3872).

Before Sharp departed, Campbell handed to him two one hundred dollar bills. Sharp's expenses on account of meeting Foster and Campbell had been about \$75.00. For the payment to Sharp, Campbell was reimbursed by Steunenberg, who reported the outlay to the Barber Lumber Company. In the account of that company the item is entered under the head of "Attorneys Fees," and is credited as:

“Jan. 1, 1903, paid A. B. Campbell
for services Special Agent \$200.00.”
(pp. 3869, 3870, 3875, 3876, 1037, 5247).

Concerning his obligation to Campbell on this account, Steunenberg writes:

“Regarding money paid out by you in interest of my timber operation, I will remit in a few days. Expect some of my people here soon” (p. 3867).

Some time after his interview with Sharp, Mr. Campbell seems to have lost interest in the Idaho timber land cases. Early in 1904, when he was in New York, he was visited by Steunenberg, (this evidently should be 1903, as Steunenberg was in Washington at that date for the purpose related by Campbell) (p. 4721), who was still in trouble on account of these or other entries in the Boise district. Steunenberg requested Campbell to go to Washington and see some of his friends there, either Senator Spooner or Senator Hanna, in the interest of the Barber Lumber Company (p. 3870). This Campbell declined to do, being then on the point of sailing for Europe.

Sharp returned from Spokane to Boise, where he continued until 1904 to be stationed upon the duty of investigating entries which had been made and were making, of the timber lands which were bought by the Barber Lumber Company. His attitude toward those entries manifested a change which was remarked by at least one of the local officers, by whom he was consulted concerning each of the cases (p. 3218). He made no further adverse reports, although he was

continually employed in the work of investigation, a fact which is particularly noteworthy because the Barber Lumber Company had, as early at least as the summer of 1902, disclosed its identity, and because, moreover, at that time it was regarded by the Interior Department and the legal profession as a violation of the timber land law to buy or sell land before final proof. Of the 15 or 20 entries which had caused Steunenberg so much concern, and which had occasioned the exercise of Senator Foster's influence, the twelve on which adverse reports had been made, remained suspended; but the others were allowed to be passed to patents because Sharp could find nothing definite against them.

Mr. Garrett, the receiver during this period, says, speaking of Sharp's official conduct after the Spokane episode:

"His attitude did change, because after that he hesitated about pushing the cases after that." * * * (p. 3221).

"He was afraid after that, apparently, to push his investigation into these entries, * * * these fraudulent entries in the Basin." (pp. 3221, 3222).

"I believed at that time, and I believe now, that Mr. Sharp was intimidated in a way from doing his duty." (p. 3223).

"I understand that there is evidence in the record as to what Mr. Sharp received, and what Mr. Campbell gave, and what Senator Foster did in the matter; you know that as

well as I; you can draw your own conclusions, and I presume the court can" (p. 3223).

Indeed, Sharp himself expressed to Garrett the embarrassment he felt on account of what had occurred:

"He said he was between the devil and the deep sea—his senator on one side, and he didn't know whether the Commissioner would uphold him on the other." (p. 3222).

Two United States senators appear to have been actively concerned in forwarding the interests of the Barber Lumber Company. At least two others were solicited for their influence in the same business. In 1906, Mr. Borah, who had for three or four years been the company's salaried attorney at Boise, was elected United States Senator from Idaho.

It is now authoritatively stated, on behalf of the Barber Company, that two public officers who antagonized it were displaced for that reason, and that a third officer, who did not antagonize it, was allowed to remain in the service. ()

In December, 1902, Palmer, being in the East, wrote to Moon a letter, which is not produced, in which he seems to give assurance of favorable action upon the Anderson and other entries, which were still suspended. In answer to this intimation, Moon wrote to Palmer, in New York, on December 17, 1902:

"I also note what you say about suspended entries being released, and I sincerely hope it is no mistake, so that Steunenberg can go on and acquire land in accordance with his contract and we can record our titles" (p. 4476).

In the preceding July, Moon had stated to Palmer the opinion that "it would not be advisable for us to have these deeds go on record for the present" (p. 4471, copied *supra*). The reason given by Moon, in connection with his testimony concerning that letter, was, that it would increase the price of timber land if it should be known that the Barber Company was collecting lands in the Basin.

The letter last quoted indicates that the indisposition to record deeds had some relation to the Government investigation then in progress.

On January 7, 1903, Barber addresses Steunenberg a letter at Knoxville, Iowa, and says:

"I have your letter of the 5th from Washington and note fully its contents, and am glad you have adjusted matters with the authorities" (p. 4721).

On April 12, 1903, William Sweet wrote to Barber a letter in which, *inter alia*, he said:

"Is the Governor under any obligation to you, if so, what for?"

"If you are out of money on the 12 claims held up, it ought to have come out of Kinkaid and Wells" (p. 4788).

This letter was referred to Steunenberg, who undertook to answer it. Barber himself also wrote on the subject to Sweet (p. 4789).

Neither of these answers was produced in this testimony.

THE CROOKED RIVER ENTRIES.

Patrick Downs, in the spring of 1902, while cruising the Basin and locating applicants in that region, learned that the four townships west of Crooked River bore timber. In the language of Wells, to whom Downs reported this fact, "Mr. Downs discovered Crooked River;" and he estimated that the region was good for 100 claims under the timber land act (pp. 4095, 4096).

Accordingly, in the Spring of 1902, or shortly afterwards, Downs entered upon the examination of the Crooked River, and made estimates as to the quantity of timber on the various quarter-sections. These estimates were, at some time, reported to Steunenberg, and were used by the Barber Company for the guidance of its agents in the selection of the lands (pp. 4521, 4523, 4714). The company had a report of Downs to the effect that the region contained 314,000,000 feet, and that it was better timber than that in the Basin (p. 4715).

Although it is testified (p. 4397) on the part of the defendants that Steunenberg, upon his visit to Eau Claire in March, 1902, did not mention the Crooked River lands, it can scarcely be doubted, in view of his intimate association before that date with Wells and Downs, that he knew of the timber on that stream and that his associates intended to exploit that region in the coming summer. It may be inferred from some indications in the evidence, that the entire body of timber bearing land was spoken of as the Boise Basin,

that appearing to have been a general term for the whole region drained by the Boise and its tributaries, and more precise distinctions were not made until it became necessary to distinguish between the original body of land in the Basin and the new field occupied by the later entries.

The contract of March 12, 1902, while it in terms relates only to lands intended to be acquired in the Boise Basin, stipulates for the purchase of not less than 25,000 acres. This area would require nearly 160 entries, and the number of entries actually made in the Basin proper is only 120, or perhaps two or three under that number, covering something less than 19,000 acres. (pp. 3293 to 3306 and 3317, 4138) (Defense offers book of Timber and Stone original filings) (p. 3317).

Downs and Wells practically exhausted all of the desirable timber in the Basin except the "6-4" tract in the fall of 1901 and spring and summer of 1902. (pp. 4011, 4012) This seems to indicate that the parties contemplated some lands not embraced within the Basin, as that term has been restricted in the present statement and in the testimony.

On March 12, 1902, the day on which the contract with Steunenberg was signed, Barber writes to his friend and business associate, Carson:

"Governor Steunenberg is here today. I am in hopes we will be able to fix up some kind of a deal before night, whereby we get control of the four to eight hundred millions of timber in the Boise Basin about which I wrote

you recently. When you are here in Eau Claire and have a talk with our S. G. Moon (Jack), he will be able to tell you everything that has been done. * * *

To this letter is post-scripted:

“Since writing above we have practically closed with the Governor” (p. 4807).

Upon the average, assumed in the contract and uniformly adopted in the calculations of the defendants, of 10,000 feet to the acre, it would require 40,000 acres to produce 400,000,000 feet, the minimum estimate placed by Mr. Barber upon his projected acquisition (pp. 4722 and 4801). This would involve 250 entries of 160 acres each. The 800,000,000 feet, estimated as within the possible purchase, would require 500 entries. The entries made in the Basin were a little less than 120, and those made on Crooked River, prior to October, 1903, did not much exceed 100. Unless both bodies of land were in the contemplation of the parties contracting in March, 1902, it is impossible to see where 400,000,000 feet, to say nothing of the higher estimate, was expected to be found.

On May 21, 1902, Barber writes to Palmer:

“We will, however, continue our plans in the Boise Basin.

“We have now associated with us Mr. William Carson, of Burlington, Iowa, who, with Mr. Moon, will leave here for Boise in about two weeks. They will go over the ground thoroughly and settle any question of detail and

policy which will come up at that time. * * *

"It is our idea to push the location of the timber lands as rapidly as it can be done intelligently, and, with this in view, we hope to send you another estimator in a few days.

"We will inform you of leaving of Messrs. Carson and Moon. You would probably prefer to meet them at Boise." (p. 4399).

At this date practically all the locations that were to be made in the Basin proper had been made, the number of applications recorded prior to May 21st being 113, and only 7 additional filings offered during the residue of 1902. If Mr. Barber, by the term "locations," meant the placing of applicants upon quarter-sections, he clearly did not contemplate "pushing rapidly" such locations in the original Basin. Nor could he have used the word in the sense of selecting tracts in the Basin for purchase, since Steunenberg had already done that; and claimed, with some exaggeration, as we have shown to have secured in April, 16,000 acres on the Barber account, and must have bargained for practically all of the claims then subsisting of record. (pp. 4430, 4600).

Cruisers were busy in the Crooked River district in the summer and fall of 1902, as was learned in the following January by William H. Taylor, an employe of the defendants, who was exploring for them in the winter of 1902-3. Who these cruisers were, and by whom employed, Taylor professes not to know, his

information coming from residents of that section whom he met in the course of his explorations.

Barber, in a letter to Palmer at Spokane dated May 21, 1902, stated that they now had associated with them William Carson of Burlington, Iowa, who, with Mr. Moon, would leave for Boise in about two weeks; that it was their intention to push the location of timber lands in the Basin as rapidly as could be done intelligently, and that he would send him (Palmer) another estimator in a few days. (pp. 4399, 4400). In this connection Barber in explaining why they sent cruisers over the lands to cruise and estimate such of them which they had purchased and even land that was not open to entry at that time, said, that it was his business to know all about the timber in a community in which he was operating before he had an opportunity to buy and it was customary for persons dealing in timber to inform themselves upon timber in their locality which might possibly come into the market, before it was offered for sale; he further stated, "I think there was,—I think we gave general instructions to find out where timber was located on the North Fork of the Boise River." (p. 4401).

In response to the inquiry as to "what had been the tendency of the proposition as soon as you started, as to whether it has grown beyond expectations," Mr. Moon answered, "Yes, we continually heard of other timber on the North and South Forks of the Boise River, and thought that a good deal of that might be acquired" (pp. 4465-4466).

As has been hereinbefore shown, Palmer was at

Boise from March 28, to April 3, 1902; on that occasion Downs was retained by him. (p. 2860). Again, when Moon made his first trip to Boise in June, 1902, (p. 4466), Downs did some work for which on June 16, 1902, he was paid \$43.50 by Palmer.

The other cruiser, Conners, was not called in this case; but it appears that he worked for the Barber interest in the summer and fall of 1902. Mr. Moon spent some time at Boise in June, 1902, for the purpose of informing himself as to the needs of his firm's business. He did not confine his attention to the lands already bought or bargained for, it appearing that he made some exploration in Tp. 6 N., R. 4 E., which had not then been surveyed (pp. 4399, 4466, 4547, 4713, 4738).

In August of the same year, Barber, Moon and Carson went to Boise and remained there until some time in September (pp. 4466, 4502, 4815, 4816). On this occasion, Downs, who was at the time actively engaged in locating applicants in the Crooked River region, was employed by Steunenberg to conduct the party on a tour of exploration, and acted as "driver and general pilot and guide" to show them through the country (p. 4364).

On the same occasion, in September, 1902, (p. 4502), Steunenberg informed the party from Eau Claire "that there was quite a large body of desirable timber on Crooked River and lying directly east of the Boise Basin * * * and he thought that quite a large tract could be obtained with the lieu land scrip

that would be utilized in our proposed operations at Boise" (p. 4502).

In August, 1902, the last of the Basin applications then straggling into the land office, applications for lands in the Crooked River region began to be made. Four filings for Crooked River tracts were recorded on August 27th, four on the 29th, four on the 30th, three on September 4th, two on the 6th, three on the 8th, two on the 9th, two on the 11th, one on the 13th, ten on the 15th, six on the 16th, six on the 17th, and so on, the total before October 1st being 63. In October there were 16 additional claims recorded before the 18th of the month. After October 17, 1902, follows a hiatus of nearly four months, in which no applications were filed for Crooked River lands. In February, 1903, there were two; then no more until April, when the activity is renewed; and from April 22d to the first of the following August the record shows 23 filings for tracts in this region.

During the season of inactivity in the Crooked River region which suddenly supervened after the middle of October, 1902, there occurred some correspondence which is deserving of mention at this point of the narrative as indicating the interests concerned in promoting the entry of lands in that district, and as also reflecting upon the motives and purposes of the persons most responsible for the activity in that regard; and also advert to evidence already set out herein showing the real reason for the cessation of filings October 17, 1902, and the renewed activity after April 22d.

Some time before December 26, 1902, Senator Quarles of Wisconsin introduced in the United States Senate a bill to repeal the timber land law. On that date Mr. Barber wrote to Senator Quarles:

"I notice that you acting under recommendations contained in the President's message have endorsed a bill in the Senate to repeal a bill what is commonly known as the timber and stone act, whereby any one can obtain 160 acres of land belonging to the Government when it can be shown that the timber and stone on such lands constitutes its principal value. Will you kindly let me know if it is your intention to push this measure to a conclusion at this session of Congress. We have some extensive interests in Idaho and tributary to our operations is a large tract of Government land. Scattered through the country are many old stranded placer miners who are taking up timber and stone claims for the purpose of getting a new **grub stake**. When these men have proved up their claims and secured their title from the Government they come to use and we have in many cases bought the timber on their lands. Whether or not this will continue is important for us to know, and if this is to be prohibited by law, it is very important. Shall be pleased to hear from you fully on this subject at your earliest convenience." (pp. 4811, 4812).

On the same day Barber wrote also to Carson a let-

ter which is largely mutilated, but which appears to have mentioned the Quarles bill, and then proceeds:

"I have written Quarles if it is his intention to push this bill through this session. If it is, should we not buy a little scrip if we can find it at a reasonable price; we will have our six thousand acres in time and we will not use any of it in the Basin awaiting further developments at Washington.

"I have given Steunenberg instructions to hold up all matters in the Basin at present and devote his entire time and energy to securing what timber there may be tributary to the North Fork along the lines herein set forth.

"If these reports are anywhere near true, and we can secure one hundred and fifty millions on the North Fork, now filed upon, at less than 60 cents per thousand, with the prospect of a hundred and fifty million more, together with the mill site on the river, we will be pretty well fixed after all" (p 4716).

North Fork is another name for Crooked River, or rather the two names designate the same body of land (p. 4716).

The 300,000,000 feet contemplated in this letter, allowing the accepted average of 10,000 to the acre, would require 30,000 acres, or more than 180 entries under the timber land act.

In answer to the last quoted letter, Carson, on February 18, 1903, wrote to Barber:

"I enclose a clipping from the New York

Commercial relating to the Quarrels (Quarles) bill. If the timber and stone act is repealed, and substitute is passed that land can be sold in one hundred and sixty acre lots at four dollars per acre, you might be able to get along even if the timber and stone act is repealed" (pp. 4729, 4730).

On March 20, 1903, Barber wrote to Steunenberg:

"As we wrote you recently, we will not rest at all easily until we absolutely control not less than six hundred millions of timber. We are compelled to leave this important part of the business to you for the present, and will urge you to put into it all the energy possible" (pp. 4722, 4586).

According to the estimated average, adopted by Barber and Moon, of 10,000 feet to the acre, 600,000,000 feet would require 60,000 acres, or 375 quarter-sections of timber land (p. 4722).

At the date of this letter they had less than 120 quarter-sections in the Basin, and there had been only 81 applications filed for tracts on Crooked River. The company, therefore, had only about three-fourths of the 400,000,000 feet, or 250 quarter-sections which Mr. Barber, in his letter to Mr. Carson, of March 12, 1902 (*supra*), had declared to be his minimum expectation under the Steunenberg contract.

It will be observed also that, in March, 1903, although operations are no longer going on in the Basin, there is still a demand on Steunenberg to pursue his agency.

In Barber's letter of December 26, 1902, to Carson, quoted in part *supra*, it is stated that the writer has instructed Steunenberg to buy certain claims before final proof, the letter being mutilated in the part which identifies the claims, but the general context showing that they were in the Crooked River region (pp. 4713-4716).

It will be remembered that, during the fall of 1902, Steunenberg and his associates were greatly concerned on account of Special Agent Sharp's activity in relation to timber land claims, and the fact that he had reported adversely upon some entries and was about to make further adverse reports. The situation became so acute in the latter part of October that Steunenberg felt obliged to make a second visit to Senator Foster at Tacoma and to insist that the Senator should see Sharp. The interview between Sharp and Foster occurred just after November 8th, 1902, (pp. 3742, 3746, 2893, 3744), and while no adverse reports were made after that date, the twelve entries remained suspended and Sharp continued in the duty of investigating.

In the spring of 1903, Henry A. Snow, who had left Idaho in November, 1901, returned to Boise on account of his homestead and other affairs, and had some conferences with Downs and Wells concerning matters of common interest. Downs informed Snow that the winter's business had been bad, by reason of the fact that a Government inspector had been trying to hold up claims, but that the inspector was now "crossed up" or "tossed up," and prospects were

better. (This was the period between October 17, 1902, and April 22, 1903, above referred to.) The testimony of Snow in relation to this communication runs thus:

“Q. What did he (Downs) say?

“A. He said the reason they wasn’t doing much, there had been a mix-up or stir-up and somebody was trying to hold up their land.

“Q. Did he express himself as expecting better times?

“A. Yes, sir, oh yes.

“Q. Did he say anything about a Government inspector?

“A. Yes, he said there was a Government inspector went out there after the muss was stirred up and investigated and went back and said it was all right.

“Q. Did he write you to the effect that “Now that we have the Government inspector crossed up things will be all right?”

“Mr. Bundy: Objected to as incompetent, irrelevant and immaterial and hearsay.

“A. No, he didn’t, not in writing.

“Q. Well, did he say that to you?

“Mr. Bundy: Same objection.

“A. Yes, sir.

“Q. Now what did he say, Mr. Snow?

“Mr. Bundy: Same objection, incompetent, irrelevant and immaterial.

“A. Why it was in 1903 after I went out there to live on the homestead, I got back there

in May, I think it was, sometime. And of course we were old friends and I met him on the street and we got to talking over the past and so forth, and he got to telling me about—well he didn't go into details at all about it, he just simply said there was a mix-up, and those people in the Basin had been making some correspondence with Washington and there had been an inspector out there and looked the thing over and reported it all o. k.; he guessed he must have been tossed up in some way, or something like that, and reported it all o. k.

“Q. Now after your return to Boise in May 1903, was it?

“A. Yes.” (pp. 3915, 3916, 3917).

On the same occasion, or on one of about the same date, occurred a conversation which establishes the identity of the interests concerned in the Crooked River entries with the interests by which the entries in the Basin had been procured. Mrs. Dora Burns, as has been stated, relinquished her claim and had withdrawn from the land office and applied to her use the money entrusted to her for the purpose of buying her claim. Although the name of Mrs. Burns is not mentioned, the following passage from Snow's testimony clearly relates to the transactions with her:

“Q. Now do you remember whether or not Downs told you about somebody that had beaten the people out of some money—some woman?

“A. I remember him saying about some

lady beating him out of four hundred dollars to prove up with.

“Q. What did he say about that?

“Mr. Bundy: Objected as incompetent, irrelevant, immaterial and hearsay.

“Q. State the circumstances, where you were and all.

“A. We were on the street and walking around town, just killing time, and some lady passed us and he says, “There is a woman,” he says—well I won’t say which, whether he said “beat us” or “beat them” or whoever she beat—it was something like that—“out of four hundred dollars.” Instead of proving up she went to the land office and didn’t prove up and got the four hundred dollars.

“Q. How long after you saw that lady on the street did you see Mr. Wells?

“A. Oh probably half an hour or so.

“Q. Did you say anything to Mr. Wells about seeing that lady?

“A. Why I don’t know whether I spoke of the subject first or Mr. Downs. Anyway it came about. I says, “I seen one of your victims,” and Downs said, “Yes, the one that got the four hundred dollars and built the cottage with.

“Q. And what did Wells say?

“A. Wells kind of smiled and laughed and says, “Yes, she got the four hundred,” or something like that, “but we were more care-

ful," or some effect, "who we located." (p. 3917).

"Q. Did he tell you they had to have some assurance before they located people at that time?

"Mr. Bundy: Objected to as incompetent, irrelevant, immaterial, leading, suggestive and hearsay.

"A. No, I don't think he did put it in that way, those words; but they had to have kind of confidence in people that they wouldn't beat them out of their money, that they would prove up; something like that; he didn't use the word assurance." (p. 3918).

The testimony of Snow upon these points is especially significant by reason of the reluctance and evasive disposition which are strikingly manifest throughout his deposition.

The interest of Wells in his clients, even after his business with them was finished, and perhaps the concern of the other persons connected with the Crooked River transactions, appears from a striking piece of testimony given by one of the persons figuring in these transactions.

Among those who filled applications for tracts on Crooked River in the fall of 1902 was Mrs. Helen E. Eagleson, whose application is dated in October and whose proof was made in the following February. In April of 1908 the grand jury of Boise was investigating the methods by which the Barber Com-

pany's lands had been acquired. In her testimony Mrs. Eagleson says:

"A. I am not sure but what Mr. Wells came to our home about a year ago perhaps, or during the time the grand jury met here, with some questions for me to answer, and, if I remember correctly, I answered them.

"Q. Did he write the answers down that you made?

"A. Why, he had a blank with certain forms to fill out, if I remember correctly. I think that is the gentleman; I am not sure. I couldn't swear to that—that is as I remember. That was the only time I ever met Mr. Wells or knew who he was, and he introduced himself.

"Q. And these questions had to do with the manner in which you acquired this property?

"A. Yes, sir." (pp. 1057, 1058).

It will be observed that, during the five weeks beginning on August 27th, the locations on Crooked River followed each other with great rapidity, averaging about two a day, though actually made for the most part by parties composed of several persons. The testimony, at numerous places, shows that the business was done with a rush, and that the project of entering timber lands on Crooked River caused as much talk and excitement in Boise as if those lands were a new discovery of unsuspected wealth. Among

the applicants were an unusually large number of women.

Mrs. Schmelzel, a witness for the Government, under a very genial cross-examination, gave this testimony:

“Q. Before you went out to file on this land, had you heard it talked about for some time among your lady friends that timber was being taken up in the Basin?

“A. It was discussed everywhere.

“Q. Wasn't there quite a rush at that time by the ladies of Boise City to get these timber claims?

“A. We met quite a few going and coming.

“Q. What class of people was it taking them up—the well-to-do people of the city?

“A. Mostly.

“Q. People of means?

“A. Yes.

“Q. Whose husbands were engaged in business?

“A. Yes.” (pp. 816, 817).

Mrs. Schmelzel made her application on October 3, 1902, and her final proof on February 16, 1903; she received her final certificate on February 16th, and conveyed to Horace S. Rand on the 25th, Rand subsequently conveying to the Barber Company.

Mrs. Nusbaum, the wife of a commercial traveler, together with her husband, (who has since died), and under his direction, made an application on October 7, 1902. Mrs. Nusbaum had, before going on the

stand, been requested to give a statement to counsel for the Government, and had afterwards reported to Mr. Fraser, "They didn't get anything out of me." Upon cross-examination by Mr. Fraser she testified:

"Q. Mrs. Nusbaum, before you went up to look at this timber claim, had you heard it talked about generally in Boise among your friends that there was timber claims to be located in the Basin by parties entitled to locate them?

"A. Yes.

"Q. It was general talk around town, wasn't it, about that time?

"A. Yes.

"Q. And there were a great many people going up there to locate?

"A. Yes.

"Q. And, I understand, you made up a party of your friends to go up and take up these claims?

"A. Yes, sir. * * *

"Q. And in the nature of an outing party, wasn't it?

"A. Yes." (p. 858).

Jeanette B. Cooper, who lived with her sister, Annie E. Kempner, wife of Moses, at Kempner ranch, testified on cross-examination as follows:

"Q. Can you state in a general way to what extent people were stopping, going and coming, how many people a day, in September and October of that year? (1902).

"A. I couldn't say just how many. I know we were just as busy as we could be. Sometimes there were as many as three teams coming and going a day. As every party that came had to stay over night they were always coming and going." (p. 1315).

Speaking of the period during which the Crooked River lands were taken, the witness, Elof Anderson, says:

"There was so many that was talking about taking up timber claims that I can't remember who it was. It was general talk about taking up timber claims about that time and had been for a year previous." (p. 514).

In all the Crooked River cases, so far as there is any evidence in the transcript, the applicants were located by Downs and paid location fees to Downs or Wells. With few exceptions, the lands secured through Kinkaid, and Pritchard, concluded the settlement with the entrymen, the whole transaction reflecting with substantial identity the methods used in the entry and transfer of the Basin lands.

The number of applications filed for lands in the Crooked River district down to October 1, 1903, was 106. Of the 106 tracts involved, it appears that 101 were sooner or later acquired by the Barber Lumber Company, there being no evidence as to the remaining 5 and it not appearing that in those cases titles were perfected.

Of the persons making entries in this region, 59 were called as witnesses in this cause, and their

entry papers were put in evidence. In 38 other cases the entrymen were not found, but their entry papers were produced.

Of the 59 entrymen who gave testimony in this cause, 34 testified that, when they made their respective applications, they did not know of any market for the land in which they were investing.

Of the remaining witnesses, several had been told by Kinkaid, and some by others, that the land could be sold, but none seemed to know, or would admit, that he knew who the purchaser was to be.

It affirmatively appears that Clifton C. Blevin, John E. Hobbs, Mary Thompson, Edward A. Lockhart and Bert Resser obtained from either Wells or Kinkaid the money with which to purchase the land; and Andrew Joplin, although he now denies the fact, stated in March, 1907, to the then United States Attorney that the money used by him came from Wells. The pecuniary condition of many, perhaps most of the other entrymen on Crooked River makes it extremely difficult to believe that they proceeded without financial aid.

Two, at least, of the entrymen did not pay the filing fees. John Kinkaid advanced the money with which Benjamin R. Allen paid his filing fees (p. 576), and Edward A. Lockhart does not know who paid the filing fees for him (p. 1839).

Of the entries made in the Crooked River region, several are particularly noteworthy by reason of attendant circumstances which indicate the identity of the influences in operation and the character of the

methods employed, and also as demonstrating what an attraction the lands in that remote district exercised upon the impecunious residents of Boise, fifty or sixty miles distant.

Clifton C. Blevin was approached by Henry Rics, now deceased, who was soliciting entrymen in the interest of John I. Wells, and who suggested to Blevin the advisability of making a timber land entry (p. 393). Blevin was conducted by Rics to Wells' office, and Wells told him that he could go up and view the land the next day (p. 394). Downs located him. Immediately upon Blevin's return to Boise, Rics took him to Kinkaid or Pritchard's office, where the filing papers were prepared (pp. 395, 396). Rics obtained the money for Blevin to make final proof and instructed him to say at the land office that the money was all his own, and to take the Receiver's receipt to Pritchard's office, where he would get his money. (pp. 397, 398). The deed purports to be executed before Pritchard on April 30, 1903, the day following the issuance of the Receiver's receipt and the Register's final certificate. The final proof papers (Plaintiff's Exhibit No. 21) show that the entryman followed the instructions given him. In response to "where did you get the money with which to pay for this land, and how long have you had same in your actual possession," Blevin answered, "from my work since the first of the month, I have had all of it. Some six months."

William H. Humphrey was informed by John I. Wells that he, Wells, wanted certain timber lands,

and that they would pay a fixed price for claims, provided the applicants took the lands which Downs would select for them. With this agreement and understanding with Wells, Humphrey filed an application for a tract of timber lands, and afterwards conveyed the same as Wells directed him. Humphrey's testimony is as follows:

"Q. What did Mr. Wells say to you about taking up one of those claims?

"A. Of course I can't remember all of the conversation, but the substance of it was that there were some claims to be taken, that they would like to have—that they were allowing a certain amount for them.

"Q. And was that before you located?

"A. Yes, sir.

"Q. Was that before you went to look at the claim?

"A. Yes sir, that was before I went to look at the claim.

"Q. Well, what did Mr. Wells say about locating you on any particular claim?

"A. Well, let me think awhile—I can't remember anything particular was said about it at that time; but he gave me the assurance that there would be a certain amount paid for claims that were taken and located by Mr. Downs at that time, providing they would locate on these claims that he showed us.

"Q. And what were you to do with the claim?

Mr. Bundy: We make the same objection.

“A. Well, if we sold to them—that is, if we got these claims and we sold to them we were assured by Mr. Wells—we were assured by Mr. Wells that we could sell these claims, that they would take them off our hands, providing, we took the claims Mr. Downs showed us.

“Q. And was anything mentioned about the amount you were to get for the claim?

“A. Well, the amount mentioned was in this way, providing I let them have it, I know I was to make about \$200.00, as near as I can remember. That would be about my profit on the claim.

“Q. And did you take up one of the claims that was pointed out to you by Mr. Downs?

“A. Yes, sir.

“Q. And you subsequently conveyed to someone whom Mr. Downs told you to?

“Mr. Bundy: I object to that as leading, hearsay, incompetent, irrelevant and immaterial.

“A. I did subsequently, yes, sir. (pp. 3496, 3497).

Afterwards being assured by Wells that he, Wells, would purchase any claims Humphrey might be instrumental in locating, Humphrey located David G. Thompson on the tract selected by Wells, and furnished part of the money for final proof under an agreement with Thompson that the profits arising

from the transaction were to be divided equally between them. (pp. 3498, 3499).

In pursuance of Humphrey's agreement with Wells, and at the solicitation of Humphrey, Benjamin R. Allen, filed a timber land application. Humphrey paid the locating fee of \$25, Downs located him, Kinkaid furnished filing fee and prepared papers. (pp. 575, 576); and Humphrey furnished the money to make final proof, (p. 577), it being agreed that he and Allen should share equally the profits from the entry. Benjamin R. Allen, (p. 571), fully corroborates the testimony of Humphrey. Allen in 1902, was employed driving a team, and did not have the necessary \$7.50 to pay the filing fees at the local land office. Kinkaid furnished him that amount. (pp. 575, 576). In his final proof and on the advice of Humphrey, Allen testified (p. 579) that "I borrowed \$200.00 from a friend, balance I earned, have had it 6 or 7 months," (p. 4921). Allen understood that he was hired to make the entry for Humphrey. In his testimony given on cross-examination, occurs the following:

"Q. Mr. Allen, who are you working for at the present time?

"A. The Barber Lumber Company." (p. 580).

"Q. Were you employed by anybody as a hireling or for wages to enter this for somebody else, or did you enter it for yourself?

"A. I don't know. I suppose it would be a little on the wage earner proposition." (p. 583).

“Q. Tell us what he (Thompson) said and what you said.

“A. I can't remember the conversation word for word. I can give you an idea. He told me that there was some fellows here buying up land or locating people on land and buying it from them and paying them for their trouble. He said he had something to do with the proposition and he knew others. He gave me the names of several others that were in this proposition at the time and showed it up to me in that light, that they were exercising their rights that would practically do them no good individually, and getting two or three hundred for their trouble, and no danger in connection with it and two or three days after that he introduced me in his shop to this man Humphrey. He told me that Humphrey—

Q. (Counsel for defense interrupting). This was before you filed?

“A. This was before I filed. He told me that Humphrey was dealing with this company or whatever it was, and that he was locating people on the property and that he (Humphrey) would fix me out all right; so Mr. Humphrey told me when this party was going out and I went with this party.” (pp. 586, 587).

“Q. And up to August 10, 1903, and up to the time you filed this paper, at that date were you at perfect liberty so far as any contract ex-

isted to sell it to anybody who would pay you the most for it?

“A. No, sir.

“Q. Why were you not, on August 10, 1903, when you filed this paper, after you had filed it and left the land office, were you under any obligations which would prevent you from selling it to anybody who would give you the most for it?

“A. I was under obligation to Mr. Humphrey, I should think.

“Q. In what way?

“A. Because he was the man that located me on the ground and furnished the money.

“Q. How much did he furnish you?

“A. All that it took.

“Q. Did you understand all through this matter that you were to turn this land over to Mr. Humphrey?

“A. Yes, sir.

“Q. And that Mr. Humphrey had practically bought your claim?

“A. Yes, sir.” (p. 588).

“Q. The vague understanding was, and you thought all the time that instead of buying a timber claim from the Government and selling it you was entering one for Mr. Humphrey?

“A. Yes, sir.

“Q. You know, of course, that was against the law?

“A. Yes, sir.

"Q. And you went to the Land Office on August 10, 1903, and intentionally, deliberately and wilfully swore to what you knew to be absolutely false?

"A. Yes, sir.

"Q. And you did that for the sake of making a little easy money? (p. 589).

"A. Yes, sir.

"Q. And when you come to make final proof you were asked some questions were you not?

"A. Yes, sir.

"Q. And you wilfully testified before the land office to what you knew to be absolutely false, did you?

"A. Yes, sir.

"Q. And you were in the market to testify to anything anybody would ask you to testify to for pay?

"A. Not anything, no sir.

"Q. You were in the market, at that time, to swear to anything Mr. Humphrey wanted you to for a few dollars Mr. Humphrey was going to give you?

"A. In regard to that, yes.

"Q. You have had no change of heart, have you?

"A. I would think so, yes, sir.

"Q. As a matter of fact you are here testifying today because the man representing the Government told you if you didn't he

would prosecute you?

“A. No, sir.

“Q. Didn’t he tell you that if you didn’t come up and——

“A. (Interrupting). The story I told him is practically what I have told here, only shorter and without any promises whatever.

“Q. Didn’t he tell you the Government wanted you to come and testify as you had testified and if you didn’t you would be prosecuted? (p. 590).

“A. No, sir, he told me I would be expected to tell the truth.

“Q. But he told you that if you didn’t you would be prosecuted?

“A. No, sir.

“Q. Have you ever been before the Grand Jury?

“A. No, sir.

“Q. I call your attention to the date of this deed. Did you sign it the day it is dated?

“A. I don’t remember whether it was before ——

“Q. (Interrupting). Do you remember what was written in it at the time you signed it?

“A. No, sir, I never read it over.

“Q. Did you go up to Pritchard’s office to acknowledge this?

“A. Yes, sir.

“Q. It is acknowledged on the 19th day of

February, 1904. Was that the day you made it?

“A. I don’t think the date is correct.

“Q. When do you think it was? (p. 591).

“A. I think the date I signed the deed in Mr. Pritchard’s office was November 6th or 7th, something like that.

“Q. What makes you think that?

“A. It was the same day I filed it.

“Q. What day did you file it?

“A. I proved up on the 6th of November.

“Q. Have you looked at the final proof papers?

“A. No, sir. (p. 591).

“Q. You just recollect that?

“A. Yes, sir.

“Q. You say that Mr. Humphrey at the time you made final proof paid you \$100 in addition to what you had already been paid?

“A. Yes.

“Q. So that what you got for your perjury was \$100?

“A. Yes, sir. (p. 592).

“Q. Now, referring to this cross-examination (Final Proof papers) calling your attention to this, Plaintiff’s Exhibit No. 31 T, marked cross-examination, that is signed by you, is it not?

“A. Yes, sir.

“Q. One of the questions asked is “what do you expect to do with this land and lumber

on it when you get title to it?" And you answered that "I have made no plans, cannot say at this time." Had you made any plans at that time?

"A. I believe I had made some plans.

"Q. And they are the plans you have told me about?

"A. Yes, sir.

"Q. "Where did you get the money with which to pay for this land and how long have you had same in your actual possession? A. I borrowed \$200 from a friend. The balance I earned. Have had it six or seven months." Was that also false and intended to be false? (p. 593).

"A. Yes, sir.

"Q. And all of this false evidence was given in consideration of some unspecified and unnamed amount which your friend Thompson had told you your friend Humphrey would give for false swearing?

"A. I understood I was to get \$100 or more." (p. 594).

John E. Hobbs (p. 1331) was informed by Mr. Harrington that he could make \$200 or \$250 by taking a timber claim. Hobbs told Harrington that he did not have the necessary funds to pay for the claim. Harrington assured him that the money would be furnished in due time. (pp. 1332, 1333). Hobbs joined a party of six (p. 1334) and went beyond Idaho City to view the land. Downs located Mr.

Hobbs "over the hill" on a claim situate ten miles from the land inspected and on a tract Hobbs did not have opportunity to see. (pp. 1036, 1037). Hobbs paid a part of the locating fee and the remainder was held out when he conveyed the land and received \$200 or \$250 for his services in making the entry (pp. 1336, 1341, 1355). The day previous to the time set for making final proof John I. Wells said to the claimant, "Do you prove up tomorrow?" and handed him \$405, adding "you know what this money is for" and instructed him to give the Land Office Officials to understand that the money was his own. (p. 1339). Hobbs followed the advice given him by Wells in his testimony given on final proof. Shortly after this, Wells interrogated him as to "when he was going to transfer the claim" (p. 1340). Final proof was made and final certificate issued November 10, 1903, and the deed purports execution December 7, 1903. Hobbs executed the deed before Mr. Pritchard and "took what they gave him," between \$200 and \$230, the remainder, the locating fee, being held out. (p. 1342).

On cross-examination Hobbs testified:

Downs gave him the idea that he could sell the land if he took it up. (p. 1344).

Downs arranged the party to go up to the land. (p. 1346).

Downs took him to a corner and told him that his claim was over the hill. (p. 1347).

Had he not known that he could sell the land he would not have taken it. (p. 1352).

Thomas S. Thompson and Mary Thompson, husband and wife, made timber land applications. Mr. Thompson had a family of nine children. (p. 1519). Mrs. Thompson had about \$90, the last remnant of her share in her father's estate. (p. 1488). Thompson had no capital at all, was ill and unable to work and at present is employed as a street sweeper by the city of Boise. (p. 1478). William H. Lewin, one of the March 1902 Moore's Creek entryman (No. 350), suggested to Mr. Thompson that he take a timber claim, and accompanied him to John I. Wells' office. Wells gave him a letter to Downs (pp. 1520-1521) who located Thompson and his wife. When the time came to make proof, Wells advanced \$400 to Mrs. Thompson, but did not supply Mr. Thompson with the necessary funds, and Thompson abandoned his claim. The \$400 was sent to Mrs. Thompson by Dean West, who has been referred to herein as a solicitor for Wells and Downs. (p. 1487). Two weeks after Mrs. Thompson submitted final proof, Kinkaid informed her husband that he would buy her claim. She sold, through Kinkaid, and the land became the property of the Barber Lumber Company. (p. 1390). Mrs. Thompson testified falsely before the land office, in that she made oath that the money with which she purchased the land was left to her by her father, and that she had been in the possession of the same for three years. (p. 5044).

Edward A. Lockhart, a dentist, and Bert Resser, an attorney at law, both residing at Idaho City,

thirty-six miles from Boise, made timber entries. They knew Kinkaid and Downs, and that Downs was at Kempner's ranch, twenty-two miles above Idaho City. Resser told Dr. Lockhart that Kinkaid would furnish the money to make final proof, and both knew that the Barber Lumber Company was buying timber claims. Downs located them, and Lockhart executed a sworn statement and sent it to the local land office at Boise, for filing. Some interested person, unknown to Lockhart, paid the filing fees, and he did not pay any money into the local land office until he submitted final proof. When Kinkaid advanced the \$800 with which Resser and Lockhart made proof, he volunteered the information that, "when you get ready to sell I will make you an offer on the piece of property." (p. 1842). Final proof was made and final certificate issued October 16, 1903, and the deed bears date as of November 5, 1903. In his final proof, Lockhart swore that he had earned the money used by him by the exercise of his profession, and that he had had it in his possession three or four years, a statement which he admits, in his present testimony, to have been untrue. (p. 1843).

The cross-examination of Dr. Lockhart with reference to his self-confessed falsehood on this point evinces the characteristic ingenuousness of counsel for defendants, the transcript showing this colloquy:

"Q. There is one thing here that is of no interest to me at all, or to my client, but, Doctor, I don't like to leave this record the way it is here unless you want it that way. So I will

ask you about this cross-examination that the officers of the land office assumed to put you through. (p. 1850). You testified that you expected to pay for this land with your own money and did pay the filing fees with your own money.

“A. I borrowed it. I considered it my own money of course.

“Q. I think so. I think if it wasn't you wouldn't be in a very good box to be spending any of it. That is what you meant, did you?

“A. Yes, sir, that is what I meant by it.

“Q. This other question as to where you got this money and how long you had it. The answer is, “money earned in business; have had same for three or four years.” I will ask you Doctor, if it isn't a fact that you borrowed this money upon credit you had established by your work, and credit you had established by accumulation from your work in the last three or four years, and if that isn't what you meant by saying that you had had the money that length of time.

“A. Yes, sir.

“Q. You had the credit?

“A. Yes, sir.

“Q. And a man may have credit based on his property and earning power, and I assume that if he can go to the bank and get \$5,000 he is justified in saying it is the result of his earnings, was that your understanding?

“A. That was my understanding, yes, sir.
(pp. 1850-1851).

Edward H. Starn and his wife, Mary, made timber land entries. Mr. Starn, who was a butcher by occupation, but unemployed at the time he made his application, was located by Patrick Downs. From the beginning of his testimony, Starn manifested an unwillingness to answer truthfully any question propounded. In his final proof (plf's Ex. No. 46) (pp. 4950-4951) in answer to the inquiry as to whence he had procured the money to buy the land, and how long he had had the same in his actual possession, he swore: “I sold a ranch two years ago, and have had the money since that time.”

On examination in this cause, he stated that he borrowed \$300 from Benjamin E. Stahl with which to make final proof, but became evasive when interrogated as to the source from which was derived the money used by his wife in making final proof. Starn's hostile attitude toward the Government and his indisposition to testify were so pronounced that The Examiner was prompted to interfere. In his testimony (p. 802) appears the following:

“The Examiner: How long have you been in attendance here as a witness, Mr. Starn?

“A. I was here Monday, the first day.

“The Examiner: Just this last Monday?

“A. Yes, sir.

“The Examiner: Have you talked with anybody since you were here as to what your

testimony should be in this case?

“A. I think not.

“The Examiner: With any of the witnesses or anybody else?

“A. I think not.

“Mr. Gordon: You say you think not. Do you mean that you haven’t?

“A. There has been some talk about it, but not about my testimony.

“Q. With whom have you talked?

“A. I couldn’t say about that.

Q. Do you know?

“A. Well, I might know and I might not.

“Q. Tell us the best you know about it.

“A. The best I know I guess is I don’t know.

“Q. Now, do you know anybody who has talked about the testimony to be given in the case by you or any other witness?

“A. No, sir.

“Mr. Keigwin: Q. But you know that there has been some talk?

“A. O, we talked a little over it, but I know what I know about it, and that’s all there is to it.

“Mr. Gordon: Q. Who has talked with you?

“A. I couldn’t say that anyone has.

“Mr. Keigwin: Q. But there has been some talk?

“A. O, a little talk, certainly.

“Q. And you have participated in that talk?

“A. O, more or less.” (pp. 802, 803).

Walter Joplin, (p. 1238) then 22 years of age, a grocer's clerk, earning a salary of \$65 per month, made application for a timber claim after a conference with his mother, Sonora A. Joplin, who also took a claim. He did not know John I. Wells, Pritchard or Kinkaid (p. 1239). Patrick H. Downs located him and he paid the locating fee to Wells, and Pritchard prepared the filing papers (pp. 1240-1241-1243). Regarding the source from which he obtained the money with which he purchased the land, he made the statement at the land office that he “worked for it, savings for three or four years and borrowed part from my mother, Mrs. S. A. Joplin.” (p. 5021). On examination in this cause, he testified that the money was his own; that he had accumulated \$600 or \$700 (pp. 1245-1246). Joplin submitted final proof May 4, 1903, and the deed was executed May 14, 1903.

Andrew F. Joplin (p. 1890) was 24 years of age and employed by his mother, Sonora, on her farm, at a salary of \$35 per month. His mother accompanied him to view the land and it was on her advice that he made the entry. He did not know of any market for the timber, nor did he know of any person who would purchase the timber land. Downs located him and directed him to Wells, and Pritchard prepared the filing papers. As to the money used to make final

proof, Joplin in his final proof swore that he worked for it, and had had it ten years (Plaintiff's Exhibit No. 109, also p. 1901). On examination in this cause he testified that he had the money at home, and had been in the possession of it four or five years (p. 1901). In a statement of the testimony intended to be given by him, on March 28, 1907, the witness stated to former United States Attorney Ruick, Special Assisant to the Attorney General Burch and to Mr. Oppenheim, Mr. Ruick's stenographer, that John I. Wells furnished the money to make final proof (pp. 1927-1933). George W. Butler, (p. 1877) entryman, friend and neighbor of the Joplin family, advised the Joplin boys that they would have to testify before the land office that they used their own money to make final proof. In the present testimony of Andrew F. Joplin, appears the following:

"Q. Did Mr. Butler ever tell you that it would be necessary for you to use your own money if you made entry?

"A. I dont' remember.

"Q. You don't remember that he did?

"A. I don't remember as he ever told me anything about it. He might have been speaking, as I say, about the land there at home, but I don't know as he ever told me what to do, or anything about it." (p. 1918).

"Q. Do you remember on the 28th of March, 1907, you had an interview with Mr. Ruick in his office, in which he asked you a

good many questions about this entry of yours?

"A. Yes, sir.

"Q. Who else was present besides Mr. Ruick?

"A. I don't know who the other gentleman was.

"Q. Who else was present besides Mr. Ruick?

"A. Mr. Johnson, I believe, was one of them.

"Q. Mr. Johnson was Assistant United States Attorney at that time?

"A. Yes, sir.

"Q. Was there a stenographer present?

"A. I think there was.

"Q. Do you know who he was?

"A. I don't know his name, but that little feller that used to be in here.

"Q. Mr. Oppenheim?

"A. Yes, sir.

"Q. Do you know Mr. Oppenheim?

"A. Yes sir, when I see him.

"Q. He was the gentleman who was present and acting as stenographer?

"A. Yes sir (p. 1923).

"Q. You see what I mean, don't you, Mr. Joplin? Have you given this subject so much attention and so much thought in the last two years that it has operated to refresh your memory or to make your idea more clear than when

you talked to the District Attorney?

"A. I know on the Borah trial, in these rooms, I said a whole lot that wasn't so, and I knew it wasn't so at the time" (p.1932).

"Q. Did you have any reason for misrepresenting anything to Mr. Ruick?

"A. I don't know as I did.

"Q. Or to Judge Burch?

"A. I told Judge Burch how I took up my claim and everything, furnished my own money and everything.

"Q. Do I understand you correctly, Mr. Joplin, in saying that on some of these occasions you told the truth and on others you didn't?

"A. I mean I told the truth when I was on the stand before the Borah trial, and when I was in that room there Mr. Burch asked me several questions and I answered him wrong.

"Q. Why did you do that?

"A. I don't know. I must have been rattled, or something that way. He asked me, I know, if Mr. Wells had given me the money.

"Q. What did you tell him?

"A. I told him he had" (1933).

"Q. Before you went before the grand jury you had the conference with Mr. Ruick?

"A. Yes sir.

"Q. Was that true or false?

"A. It was false.

"Q. All of it?

"A. Yes sir.

"Q. You did tell him some truth?

"A. Yes, I might have told him a few things.

"Q. But most of it was false?

"A. Yes sir" (p. 1935).

Mrs. Sonora A. Joplin took no risk in her business affairs. She preferred a tin can to a National Bank as a depository for her money (p 1234). Without any knowledge of the value of the timber land, or of what disposition could be made of it, and without knowing the agents through whom the lands were being procured, this cautious business woman traveled fifty miles into the forest, with her two sons, and made investments aggregating about \$1,400, and the three entries passed into the hands of the Barber Lumber Company.

Among the persons who made entries in the Crooked River region were Mr. and Mrs. Jacob V. Nusbaum. Mr. Nusbaum has since died, but Mrs. Nusbaum was summoned as a witness in this cause. After having been requested by representatives of the Government to make a statement of the testimony intended to be given by her, she went directly to one of the counsel for the defendants and declared to him (p. 866) that they didn't get anything out of me. The incident is thus stated on the record by Mr. Fraser, one of the counsel for the defense:

"Yesterday one of these special agents

came down and walked into the court room and took Mrs. Nusbaum out. She didn't want to go, but said she had to go up stairs. She went up there with him; and when she came back she said, 'He didn't get anything out of me' " (p. 866).

Inasmuch as Mrs. Nusbaum's testimony, on its face, indicates no irregularity in her entry, at least no conscious wrong doing, it is natural to inquire, why should Mrs. Nusbaum object to making a statement to the Government Attorney, and, why should Mrs. Nusbaum hasten to assure counsel for the defense that nothing had been gotten out of her, and, what was there to be gotten from Mrs. Nusbaum which she did not give in her testimony?

THE TAYLOR INCIDENT.

The testimony of William H. Taylor (pp. 3968 *et seq.*) is much relied upon by the defendants to establish their intention in 1902 to use scrip in the Crooked River townships, and the fact that they were, instead, obliged to buy the lands from entrymen who had anticipated the Barber Company in that district.

Taylor was employed, in October of 1902, by Steunenberg, to cruise the four townships drained by Crooked River, with a view, as Taylor was told, to the location of scrip upon some of the timber land known to be there.

How much scrip Steunenberg had or expected to have was not stated; but the impression given to Tay-

lor was that the purpose was to scrip all the land that was worth scripping (p. 3977).

Although Barber and Moon from some source learned that in the Crooked River region there was desirable timber at least as early as May, 1902, *supra*, Barber had in September been informed by Steunenberg also that the land on Crooked River was desirable, and had then directed Steunenberg to have the townships cruised (p. 4502). Steunenberg, for some reason, delayed this undertaking for a month or more, and Taylor was not employed until the 11th of October (p. 4504).

Through Governor Steunenberg's brother, Taylor procured from the local land office plats of the four Crooked River townships, with which he proceeded to the lands and began to cruise. These plats showed but one entry in all those townships (pp. 3969-3979). Very shortly, however, Taylor learned from persons resident in the region that numerous applications under the timber land act had been filed for lands in these townships, a fact not disclosed by his plats. On account of this discovery that the plats were untrustworthy, Taylor felt constrained to return to his home at Payette, a town near Caldwell, where Steunenberg lived, and afterwards he reported to Steunenberg the facts just stated (pp. 3969-3970).

According to Taylor, it was explained to him at the land office that the plats furnished him were incorrect for the reason that applications for timber lands were first entered in the tract books and were not noted upon the plats for some time afterwards or

until the entries were perfected, and that the notation upon the plats had, in October, 1902, been suffered to fall into arrears (p. 3790).

Mr. Garrett, who was at the time in question the receiver at the local land office, testifies that the practice of the office was directly the reverse of that stated by Taylor, the application for timber and stone entry or homestead entry or scrip filing of any kind was entered first upon the plats at the time the application was made or filing tendered and the notations subsequently made on the Register and tract-books. The plats at all times showed the status of the lands; "and they were always kept right up to date, in some instances the entries would not be transferred to the tract-books for some little time. The segregations were always noted however immediately on the plats," and while there might have been an occasional clerical omission to enter an application, he had never known of any, and there was certainly no time when notations generally were in arrears or the plats materially incomplete, "there wouldn't be a general oversight of this kind." (pp. 2965-2966-2967).

On the first of October, 1902, when Taylor went into the Crooked River region, 63 applications were of record in the four townships. In the first seventeen days of October, 16 additional claims were filed. For six weeks the making of timber land entries had been a subject of general talk in Boise and had caused much excitement in that town, as appears from the testimony of certain ladies quoted *supra* in connection with the narrative touching Crooked River.

Assuming that the plats furnished Taylor were incomplete and that he knew nothing of the rush to Crooked River, it does not follow, and can not be believed, that Steunenberg and Kinkaid, whose faithful alliance is beyond question, had been utterly blind to all that was going on so publicly. There may have been reasons for sending Taylor upon an exploring expedition and for omitting to tell him all that his employers knew; but it is safe to say that Steunenberg was aware of what every one in Boise knew, that about 80 well known residents of that city had filed claims for timber lands in the Crooked River townships.

Although Taylor cruised on Crooked River for only ten or fourteen days (p. 3969) and returned to Boise as early at least as the end of October, 1902, it seems that he did not report to Steunenberg the facts which he had discovered until the 5th of December, 1902 (p. 4504). At any rate, the document produced as Taylor's report bears that date, and its contents and wording are so framed as to give the impression that it is the first communication passing between the parties on the subject.

After the lapse, then of at least five weeks, Taylor informs Steunenberg that the Crooked River land had been so largely appropriated that "there was really no desirable timber left on surveyed land," and he concludes:

"Now, I believe that you will be very much disappointed at the turn matters have taken, as you would have been able to secure a very

valuable tract of timber had the land been subject to entry, as we had every reason to believe, as the plats are supposed to be the final record" (p. 4506).

At the date of this report the area appropriated in the Crooked River District was 12,640 acres. The area of the four townships was more than 92,000 acres, most or all of which seems to have borne timber; no entries were made on Crooked River between October 17, 1902, and February 12, 1903, when two entries were made, then none until April 22, 1903, when two more were made. Beginning with May 29th, 1903, a new series of entries was made, thus appropriating about 4000 acres before August 15, of that year; and since that month, not less than 2500 additional acres have been taken, in these townships, under the timber land act.

Unless, therefore, Taylor was flagrantly incompetent or had instructions to prepare this report with a view to some ulterior use, he must have found a very considerable body of vacant land in the township cruised, and certainly a larger area than the Barber Company had scrip to cover. At all events, the Barber Company ultimately found it profitable to take not only the lands then already entered but several thousand acres additional which was acquired by entrymen in the ensuing spring and summer.

Steunenberg lived at Caldwell, Idaho, and Taylor at Payette, Idaho.

Steunenberg received Taylor's report on Decem-

ber 5, 1902; Taylor having waited fully five weeks before he felt able to break to his employer the bad news that Steunenberg's hopes concerning Crooked River were blasted. The letter is dated at Steunenberg's house at Caldwell and the correspondence shows that Steunenberg was there on that day, and on that day gave Taylor a check for \$7 for advance expenses to Crooked River (5222). Steunenberg himself seems to have been so much overcome by this disastrous intelligence that he was unable, for more than two weeks, to recover his faculties sufficiently to apprise Barber and Moon that the coveted prize was lost, lost so far, at any rate, as the use of scrip was concerned.

Not until the 21st of December, 16 days after the receipt of Taylor's fatal report, did Steunenberg arouse himself from his torpor and take steps to acquaint his principals with the unhappy situation. Even then he could not bring himself to write or telegraph the facts discovered by Taylor. Instead he telegraphed from Spokane; Dec. 21, 1902.

"Start tonight. Have important information concerning North Fork" (p. 4511).

No reason is offered to explain why the "important information" which Taylor must have obtained shortly after the middle of October should have been so delayed that it was not reported at Eau Claire until Christmas, or why Taylor's report and the other facts intended to be communicated were not sent by mail a month or two before Steunenberg found it necessary to go in person to Wisconsin (p. 4509).

Arriving at Eau Claire Steunenberg stated what Taylor had discovered, and added, as a discovery of his own, that John Kinkaid had secured options to purchase all the tracts covered by then subsisting claims. He had also negotiated with Kinkaid an agreement in virtue of which the Barber Company might acquire title to these lands through Kinkaid at \$1,000 a quarter section, or possibly a little less (p. 4509).

It was, so it is said, in consequence of these facts that the Barber Company was driven to buy the Crooked River lands of the entryman, instead of scripping them.

Steunenberg, with Taylor's report, left Spokane on the night of December 21, 1902 (p. 4511), and arrived at Eau Claire on the 24th or 25th, with the information above stated as to Kinkaid's combination of the claims then of record. On the 26th of December, Barber wrote the two letters hereinbefore quoted in connection with the account of the Crooked River appropriation, one to Senator Quarles and the other to Mr. Carson. The letter to Quarles is an inquiry with respect to a possible repeal of the timber land law. In that to Carson the writer expressed much solicitude concerning the Quarles bill and proposes, in view of the danger that the timber land act may be repealed, to "buy a little scrip if we can find it at a reasonable price" (pp. 4713-4715). He mentions also the fact that Steunenberg is at Eau Claire, quotes what Steunenberg says about divers matters, but does not state that the Company's plans in the

Crooked River region have been forestalled by individual entrymen, nor does he mention the Kinkaid combination. The letter is mutilated at those points at which what Steunenberg reported seems to have been set out. The effect of Steunenberg's intelligence is, however, thus stated:

“He says there is no stir or excitement around Boise and that he will have no difficulty in getting all we want on his return” (pp.4714-4713).

In January, 1903, Steunenberg, having returned to Idaho, again sent for Taylor and requested him to make a second trip to the Crooked River townships. Taylor demurred on the ground that the season made accurate cruising impossible; but Steunenberg said he would be satisfied if Taylor would examine a few forty acre tracts taken at random, and so obtain an estimate of the whole amount of timber based upon the average of the pieces examined. (pp. 3980-3981). Downs went with Taylor to Crooked River on this second trip, having been secured for that purpose by Steunenberg. Upon their return to Boise, the last of January or 1st of February, they gave their estimates to Barber who was at Boise with Carson and Lockwood (pp. 3981-3982-3983). Steunenberg explained the necessity of cruising in midwinter by saying that his company had an option, which would expire in March, upon a millsite, and “that they wanted to know whether they could purchase a sufficient amount of land to justify them in putting up a mill, before the option would run out on this mill-

site they had, and if they could, they expected to close the deal here for the millsite, and if they couldn't, of course they expected to let the option run out" (p. 3986).

Accordingly, Taylor went again to the Crooked River lands, starting on January 21st, 1903 (p. 4520) and accompanied by Patrick Downs whom also Steunenberg had employed. The two examined a few forty acre tracts, "probably as many as ten," as Taylor remembers it (p. 3987) and returned to Boise. Here they found Mr. Barber and two other gentlemen with Steunenberg, awaiting their estimates (pp. 3981-3982).

If Taylor's second expedition was intended to inform the Barber Company whether they could afford to buy the tracts entered by individuals in the preceding autumn, it was, to say the least, ill calculated for that purpose. A hasty survey of 400 acres would afford but poor guidance in the purchase of 12,000 acres; and Taylor could hardly have learned more by cruising that area in the snow than Downs in the preceding fall had learned, when locating the entrymen on the same lands in good weather, and had already reported to the Barber Company.

The real reason for sending Downs and Taylor to the Crooked River lands in January, 1903, evidently was a desire to learn to what extent further acquisition in that region was likely to be advantageous. This appears, not only from Taylor's statement, above quoted, about the option on a millsite, but even more clearly from contemporaneous correspondence pass-

ing between Steunenberg and Barber and put in evidence by the defendants.

In Mr. Barber's letter of December 26, 1902, to Mr. Carson (*supra*; p. 4713), the writer, after suggesting the purchase of a little scrip, and the holding of the 6000 acres of scrip bought in the preceding August, "awaiting further developments at Washington," proceeds (p. 4715):

"I have given Steunenberg instructions to hold up all matters in the Basin at present and devote his entire time and energy to securing what timber there may be tributary to the North Fork along the lines herein set forth.

"If these reports are anywhere near true, and we can secure one hundred and fifty millions on the North Fork now filed upon at less than 60 cents per thousand, with the prospect of a hundred and fifty more, together with the mill site on the river, we will be pretty well fixed after all" (pp. 4715-4716).

This assumes as assured the acquisition of 150,000,000 feet, "now filed upon." Downs had reported an estimate of 12,000 feet to the acre in the Crooked River region; and 150,000,000 would require 12,500 acres, the fact being that the 79 entries initiated in the fall of 1902 involved 12,640 acres. The proposition was to secure an equal acreage in addition if it could be found in the four townships, and to this end Steunenberg was instructed "to devote his entire time and energy." The only question was, whether the requisite area could be found in that direction.

and the midwinter reconnoissance of Taylor and Downs was to solve this doubt and to determine future operations, not to throw light upon the purchase of the lands already entered and already bargained for.

Letters passing between Barber and Steunenberg under dates of January 2, 1903 (p. 4511), January 6, 1903 (p. 4515), January 20, 1903 (p. 4519), January 21, 1903 (p. 4520), and others written about the same time, show more concern about the availability of the streams for driving, the securing of the mill site and certain franchises, and other matters relating to the practical aspects of lumbering, than about the purchase of lands.

At all events, no scrip was located in the Crooked River townships after the snowshoe exploration of Downs and Taylor, nor does it appear that any scrip was bought at or about that time or for that purpose, or that the scrip they already had was laid. The filing of applications for lands in those townships was resumed in April of 1903, and the 25 tracts entered between then and August 15, 1903, as well as those appropriated in the preceding autumn, devolved to the Barber Lumber Company in due course and through just the same agencies which had been employed to secure the Basin lands.

Among those who, in and after April of 1903, appropriated timber lands in the neighborhood of Crooked River were Dr. Edward A. Lockhart, Benjamin R. Allen, John E. Hobbs and G. D. Hoseley.

Mr. Hoseley was an employee of the Barber Lumber Company, of whom mention is made elsewhere in this brief. The testimony of the others just named is abstracted, *supra*. Dr. Lockhart will be remembered as the innocent dentist who believed that his credit in the community was the equivalent of \$400 in actual cash, and therefore told the land officers that the money which he had borrowed a day or two before had been in his possession for several years. Hobbs was so little concerned about the value and marketability of the tract which he was to buy that he didn't take the trouble to go and look at it. Allen had a distinct understanding that he was proceeding under an agreement to sell the land. All the applicants filing during this period swore that they knew of no market for timber land, and most of them were, if not actually impecunious, not of the class of people likely, upon their own initiative, to make investments in a distant wilderness.

THE CASE OF CROOKED RIVER.

The defendant's evidence relating to the Crooked River entries is especially worthy of consideration in estimating the value of the defense as a whole; and this for two reasons.

In the first place, it is in reference to the case of Crooked River that the defendants make the most distinct statement of their intention to use scrip, and to go to most pains to account for their failure to do so. And, secondly, it happens that the elaborate explanation offered on this point is demonstrably un-

sound, and it is clear that the entries were procured and made in the interest of the Barber Company.

Barber and Moon, as appears from their testimony, had conceived the purpose of acquiring the Crooked River Lands at least as early as May, 1902, and had given instructions to have them cruised (4399-4401-4465), and Downs had cruised this timber immediately after the giving of these instructions, viz., in June, 1902 (), and on June 16, 1902, was paid \$43.50 by Palmer (p. 5240). Steunenberg also had agreed that the region was desirable. The first entries in Crooked River were made Aug. 27, 1902. At about the same time, Barber and Carson and Moon (4815) arrived at Boise and Barber was driven through the timber under the guidance of Patrick Downs, whom Steunenberg had employed for that purpose. (). So much is shown by the defendants themselves with reference to their intention to appropriate the timber in this district.

Downs had reported to Wells that the Crooked River timber was good for 100 entries ().

If Steunenberg did not originally promise the Crooked River Lands, it is evident that all parties had determined to acquire them by this time. The total area actually entered in the Basin, as that term is employed by the defendants, did not exceed 18,400 acres and according to Downs and Wells that was all the desirable timber in the Basin (). This left at least 6,600 acres to be found under the original contract beyond the limits of Boise Basin as now sought to be restricted.

Topographically, the Crooked River townships are as much a part of the Boise Basin as are the townships west of that stream, all of them being drained by the Boise River and its tributaries. When, therefore, the contract of March, 1902, speaks of the Boise Basin, there is no reason to suppose that the region contemplated was that fraction of the Boise Basin to which the defendants, for the sake of a convenient distinction with reference to their own affairs, have since limited the term.

If, Mr. Barber did not understand from Steunenberg that their operations were to extend to the Crooked River region, it is impossible to see where he expected to find the 400,000,000 to 800,000,000 feet upon which he reckoned in his letter to Carson written on the day the Steunenberg contract was signed at Eau Claire. The lower of these two estimates called for 250 quarter-sections, which was more than twice the number actually found in the Basin proper. In March, 1903, Barber advises Steunenberg that at least 600,000,000 feet must be secured, which required 375 entries, or more than were to be found in the Basin and in the Crooked River townships combined.

If Mr. Barber did not know, in March of 1902, that the Crooked River lands were desirable, it is difficult to believe that he was not fully informed on the subject when he drove out with Downs in the following September. Downs had been cruising the region since the previous spring, had estimated that the lands carried 314,000,000 feet in sight, and that the

timber was better than that in the Basin (pp. 4521-4523-4715). Indeed, Downs was at that very time actually engaged in locating entrymen on Crooked River, having made 11 locations in August, before Barber and Moon arrived at Boise, and five more being made in the first week of September and 63 others following in the next six weeks.

It is impossible to suppose that Barber and Moon, in the three or four days of close association with Downs, did not ask what he knew of the Crooked River lands, or that Downs failed to communicate the information then in his possession.

But, it is urged the defendants could not, at that date, have determined to acquire the Crooked River lands, because they had no estimates. This want of estimates is assigned as the reason for not locating then the 6,000 acres of scrip which they had bought in August; and the need of cruisers' reports is given as the reason for the delay which allowed the entrymen to anticipate the Barber Company's scripping of the lands.

The fact is shown by defendants' testimony that, as early at least as the first week of September, they had Steunenbergs assurance that the lands were desirable (); they had for some weeks, or could have had, Downs' estimates, which he had made in June. Downs appears to have been as competent a cruiser as any in the company's employ; and, if Barber and Moon now say that they did not think him trustworthy, their actions at that time belie the assertion, and at least 100 entrymen and the parties who

received the transfer of their entries, were satisfied with Downs' estimates, he having located fully that number upon his own estimates in this very region.

The further fact is that the Barber Company did actually take over the lands upon these very estimates of Downs, and without any other estimates. The attempted cruise of Taylor, undertaken in October, proved abortive, as defendants themselves show it and he brought back absolutely no information, which was not common talk in Boise before he started. The midwinter excursion of Taylor and Downs, if it can be supposed to have been intended as a cruise, was utterly useless for anything in the way of estimates. The men traveled on snow-shoes; the snow was deep and soft, making progress difficult; and there is mention of their sleeping in the snow (p. 4525). Only ten forty-acre tracts were examined. Considering that Downs had gone over at least 12,000 acres in making his locations, in the preceding autumn, and over as much larger area in summer before, this survey of 400 acres could not have added very materially to what he had told Barber and Moon in the previous September.

THE TAYLOR REPORT.

The first excursion of Taylor, that taken in October of 1902 seems, in the light of these considerations, quite unnecessary. If Steunenberg wanted estimates of the Crooked River timber, he could have gotten these of Downs, who had cruised the country for six months, who was at the time daily employed

in placing people on the lands and whose intimates were those actually acted upon. If Steunenberg really intended the lands to be cruised with a view to making selections, it is impossible to believe that he could not and would not have secured correct plats. Taylor's testimony, to the effect that the plats furnished him were incompletely posted, is but a statement of what somebody, unconnected with the land office, told him. Taylor himself did not know what was the practice of the office or what was the real reason for giving him imperfect plats. Garrett, who was at the time, the receiver of the office shows that the practice of the office was directly the reverse of that represented by interested informants to Taylor, and that it was impossible for the plats to be materially inaccurate; and Garrett is an entirely disinterested witness, as to whose knowledge and veracity there can be no question. The whole Taylor affair seems to have been carried through for the sake of creating an effect aside from that expressed; and Taylor seems to have been used, perhaps without his own knowledge, for a purpose ulterior to the ostensible object of his employment.

This impression is strengthened by the remarkable series of delays which were allowed to intervene in the course of Taylor's operations. Barber, in the first week of September, if not in the preceding May, directed Steunenberg to have the Crooked River lands cruised. At that time the rush to take timber had started from Boise, where Barber, Moon and Steunenberg had their headquarters, and from a dozen to

16 applications were filed within the following fortnight and while Barber, Moon and Steunenberg were in Idaho. This latter determination to cruise the Crooked River district was reached directly after Mr. Barber had spent three days in a carriage with Downs, and Downs had been for a week or so before, and continued for six weeks after to be, actively engaged in locating applicants upon the very lands which it was in Barber's mind to acquire.

During this period everybody in Boise, if the ladies are to be credited who are quoted heretofore was much excited concerning the Crooked River timber claims; and Mr. Anderson, who is also quoted herein, indicates that almost everybody was talking about them. Mr. Bayhouse, who made the pilgrimage to Kempner's Ranch on September 21st, 22nd or 23rd, 1902, or through the three days, says:

"The road was lined with people going up there and coming back while I was on the road, and I don't remember how long I stayed there; I think it was three days. It took a day to drive up and back, and there wasn't a day that I was up there but what maybe three rigs, two or three or four or more, came up there.

"Q. It was a sort of a fad?

"A. Yes, sir" (pp. 905, 906, 907).

In this state of popular excitement and public notoriety, the lands which Steunenberg intended to scrip being appropriated at the rate of 200 acres a day, and that fact being known to the whole city, he waited more than a month before he employed Taylor

to estimate them. This employment of Taylor was made on October 11th; and Taylor was sent into the woods with plats, procured by Steunenberg, which failed to show any of the 70 or 75 applications then of record. Taylor stayed on the cruise less than two weeks, discovered that the lands which Steunenberg intended to obtain had been already taken, returned to his home at Payette without reporting to Steunenberg and kept the discovery to himself for five weeks or more.

While Taylor was in the woods, on October 17th, the applications abruptly ceased, the rush died suddenly, and the sylvan quiet of Crooked River remained undisturbed for six months. Six weeks after this cessation of activity, that is to say, on December 5, 1901, Taylor went from his home at Payette to Caldwell, where Steunenberg lived.

On that day, being in the town of Steunenberg's residence, Taylor bethought himself to make a report of his cruise, a matter which he had neglected since the end of October. He did not, as a less careful man, or one less laboriously disposed, might have done, call upon Steunenberg at the latter's home or place of business, tho the correspondence shows Steunenberg was at home, and relate in person and by oral statement what he had done and learned. Instead, he wrote a letter to Steunenberg, setting out in full the discovery that he had made.

Taylor's report of December 5, 1902 (p. 4504-4506), is dated at Caldwell, and is in the form of a letter addressed to Steunenberg at the same place. It relates

to matters which are stated to have occurred more than a month before, and of which it purports to convey the first intelligence. And in concluding he says, I know you will be very much disappointed at the turn matters have taken. If it is a genuine and **bona fide** communication, it shows that Taylor had not previously made known what he had learned in the preceding October. If there had in fact been any previous communication between the parties on the subject, then the letter is misleading and was drawn for some other purpose than that appearing on its face.

The evident intention of the document is to preserve in tangible form for some future use apparent evidence that Steunenbergh was at that date informed that the Crooked River lands had been taken by entrymen. Incidentally, the letter shows, for some reason, it was deemed desirable to have a paper which should appear to be evidence that Steunenbergh had intended to use scrip upon those very lands.

It may be, as we are told that both these facts, now alleged to be facts, were facts. But, whether or not that be true, it is manifest that this Taylor report was prepared for the sake of proving those facts. Otherwise there was no occasion for committing those facts to writing at that particular date, on a day when Steunenbergh and Taylor were in the same village and within speaking distance of each other, and when the subject-matter of the communication was ancient history. If Steunenbergh had really cared whether or not Taylor had found land suitable for scripping, he did not wait until the first week in December to find

it out. If Taylor actually intended his report to impart information, he did not wait to make it until a date when its contents could not be made available for any purpose. In either case, there was no present need for a written report. For any possible purpose, having relation to then present conditions, or growing out of then present needs, the letter was wholly useless and wholly uncalled for.

The ostensible reason for the letter being no reason at all, the only rational explanation of that document is, that it was designed to embody lasting evidence of the fact that Barber and Moon had intended to use scrip on Crooked River and had been disappointed in that regard by the unanticipated outburst of Boise people, who lined the roads with carriages in a mad rush to buy lands for which all swore there was no known market.

The real reason for wishing to preserve written evidence of lawful intentions in respect of the Crooked River lands will appear upon observation of contemporaneous collateral transactions.

Steinberg was of course aware that a large number of persons had gone from Boise to be located upon Crooked River lands. It will not be seriously suggested that he had been ignorant of what every one else in Boise knew, of what the ladies of Boise were making the subject of tea-table talk, or that, astute and vigilant man of affairs that he was, he had neglected to observe that the roads to Kemper's Ranch were lined with people going up to take the lands which he had determined to have.

Nor could Steunenberg have forgotten how in the preceding season a rush of less open publicity and less impetuosity to the Basin lands had excited the suspicions and aroused the vigilance of the land officers, and had caused the assignment of Special Agent Sharp to the scene of operations. Sharp was still on the ground, and, precisely at the time when Taylor was sent out upon his futile cruise, Sharp was causing Steunenberg and his Eau Claire principals the most acute concern. In September and October the correspondence regarding Sharp was most active and most solicitous (pp. 3864, 4816 and others herein set out). On October 31, 1902, as already noted, Steunenberg wrote to Campbell:

"This feature of the timber deal is getting into bad shape. Sharpe, the inspector, and the local land office people, have worked so secretly and used so much deception, even with their friends, that I have not been able to learn the true situation, much less do any work. If not asking too much, wish you would ask Senator Foster to hold Sharpe off until I can meet the Senator. (pp. 3857, 3865) for date

A day or two after this letter Steunenberg went to Tacoma and secured from Senator Foster the promise that the Senator would personally see Sharp. The meeting took place on November 13, 1902.

The secrecy and deception used by Sharp and the land office people had, in October, 1902, prevented

Steunenberg from learning anything and from doing any work, and had so worked upon his nerves that he had journeyed to Tacoma to force the situation to a crisis. This seems sufficiently to account for the cessation of entries at the middle of October. Taylor was sent to check up Downs. But, in the light of Steunenberg's then situation and parallel conduct, it is clear why it was deemed wise to manufacture a written record of the fact that Steunenberg was trying to scrip the lands.

Barber and Moon were not less agitated than Steunenberg by Sharp's activity and no less concerned regarding the uncertainty of the situation. Their share in the correspondence on the subject is shown by the letters herein before quoted; and one of the chief elements of their solicitude related to the danger of taking deeds while Sharp was in the field. On July 17, 1902, Mr. Moon, in a letter to Palmer, reporting erroneously that Sharp had been recalled, presumes that

"Final receipts and patents on all the lands will be forthcoming at once, and you will be taking deeds.

"I don't think it would be advisable for us to have these deeds go on record for the present. Do you?" (p. 4472-4471).

This was written at a time when the appropriation of the Basin lands was practically completed, and about a month before the initiation of the rush to Crooked River. If Mr. Moon's reason for not recording the deeds is the true reason, that such

recording would cause other timber buyers to raise prices, that reason had ceased to operate so far as the Basin lands were concerned. The only relevancy at that time of that reason was to the proposed operations in the Crooked River region.

When the appropriation of the Crooked River lands was inaugurated, a few weeks later, it was confidently expected that Sharp would soon be suppressed. Senators Spooner, Allison and Clapp had been invoked to prevent further obstruction of the entries; and negotiations were in progress looking to decisive action on the part of Senator Foster. On September 15th, Steunenberg sent to Barber a letter from Senator Foster, which is not produced, but of which the nature may be inferred from Barber's letter of September 19th, '02, returning the letter, and adding:

"Sincerely hope that object in view will soon be reached through the influences exerted in that direction" (p. 4816).

The "object in view," the removal of Sharp, toward which influences were exerted through the autumn of 1902, was made necessary only by the proceedings then in progress upon Crooked River. So far as the Basin lands were concerned, they had all been entered, the suspension had been relieved as to all but twelve, final certificates had been issued upon most of them, and there was nothing more to fear from Sharp in that region. With respect to the dozen suspended entries, he had made his reports and there was no more for him to do in the way of making trouble in the Basin.

The only continuing danger from Sharp was that he might discover something about the affairs then current, the entries making in the Crooked River district. The same reasons which had, the year before, prompted investigation of the Basin entries were still operative in respect to the Crooked River cases, the same popular infatuation to take lands for which there was no market, and the same bold speculations of indigent people upon the promise of borrowed money. So long as Sharp remained in the field it was almost certain that the current entries would be investigated, and the enterprise was in danger.

The delay in the suppression of Sharp, and the continued uncertainty respecting his action, explain the abrupt cessation of the Crooked River entries at the middle of October. Such, at any rate, was the understanding of Downs and the reason which he gave to Snow for the failure of his winter's business (pp. 3915-3916).

The same facts sufficiently explain why it was necessary to provide evidence to prove that the Barber interest was not concerned in the business of location already done. In the event of an investigation, it would be useful to show that Taylor had been employed to cruise the lands as if there had been no thought of acquiring them before the 11th of October. It would look well to show that, by an accident, Taylor had been supplied with plats which represented the whole region as vacant, although no one could possibly have gotten such plats at the land office. And it was particularly desirable to obtain in written form

He had collected titles to all of the Basin lands, except the dozen tracts for which entries were suspended, and that commission was, as we are told, fully executed some weeks before. He had been, since the first week in the preceding September, arranging to cruise the Crooked River country with a view to the location of scrip, and he had 6000 acres of scrip for that purpose. In this latter enterprise, at any rate, he was in no wise embarrassed by the suspension of twelve Basin entries, nor could he be delayed by anything the Department might do or leave undone in respect to any entries whatever.

On that date, too, as Mr. Barber represents, Mr. Barber supposed that Taylor was, or had been, in the Crooked River region cruising and estimating with a view to scripping, and as yet no intelligence of the Crooked River entries had penetrated to Eau Claire. The Taylor report was only twelve days old, and its contents were not communicated to Barber and Moon until eight days later. Nor, so it is said, did those gentlemen have any suspicion that Kinkaid had collected the 79 titles already initiated and was holding them at \$1,000 each.

What, then, could Mr. Barber have had in mind when he expressed the hope that Steunenberg could "go on and acquire land in accordance with his contract," and that the titles could be recorded? If the Steunenberg contract had been completed, what further land was to be acquired, "in accordance with it?" If the land was not in the Crooked River country, where was land to be found? If something had

not occurred to stop Steunenberg, how was he to "go on?" If Barber had not heard of the stoppage of the Crooked River entries at the middle of October, two months before, what other suspension of activity could he have thought of? Unless the delay which Steunenberg had encountered was due to some danger from the land office, what other impediment was there which had any relation to suspended entries, and which could be removed by a relief of the suspension? And, if the intention was to locate scrip, what difference did it make what became of the suspended entries?

When Steunenberg reached Eau Claire on December 25, 1902, he brought with him the Taylor report, made three weeks before. It is due to Steunenberg's caution in that respect that it was possible to produce the report in evidence, since otherwise it would probably have been lost in the confusion of Steunenberg's affairs at his death. Why it was necessary to file this document in the company's archives at Eau Claire is not apparent from anything in the nature of the paper or of the transaction. The report is not a voucher for the disbursement of money. It is not addressed to the Barber Company, or, upon its face, intended for the company's use. It does not relate to the acquisition of lands, but only to an abortive effort in that direction, which was of no further consequence. It could not possibly form a link in a chain of title, and it was not a part of any series of letters or of any course of communication. It has no relation to anything going before or coming after,

but is merely an isolated paper, at most of only ephemeral interest; and there was, so far as appears, no more reason for preserving it in the files than if it had been an old news-paper.

On December 26, 1902, the day after Steunenberg brought Taylor's report to Eau Claire, Mr. Barber enclosed that document in a letter to Mr. Carson, at Burlington, Iowa, saying:

"I also hand you report of estimator employed by the Governor, which explains itself. * * *

"Please return enclosures at your convenience" (pp. 4716-4717).

This paper, with others, was returned by Mr. Carson on the 29th; and on January 2nd, Mr. Barber writes:

"I received under another cover all the documents sent you and presume you didn't care to retain them longer. You certainly could have held them as long as you desired. Our object in returning them here being to have them filed with other papers" (pp. 4714-4715).

There is certainly nothing, on the face of the Taylor report or in the conditions stated as then existing, which should dictate all this care in keeping track of that paper and in filing it with other papers. Indeed there were, so far as is shown, no other papers of cognate nature or bearing upon the same transaction with which Taylor's report could be filed. If there were any letters written, before or

afterwards, concerning Taylor's ineffectual cruise in October, they were not produced. If there were any other documents relating to that transaction, and to the subject matter of which Taylor's disclosure about the entries was relevant, those documents are not hinted at in the testimony of Barber and Moon. So far as appears, the report is a merely casual piece of paper inserted into the files, with no reference or relationship to anything else found in the company's archives. And all the anxiety shown in regard to the document is inexplicable unless it be assumed that, for some reason, it was regarded as a piece of evidence which might be valuable in some contingency.

As a piece of evidence, indeed, intended to corroborate the account now given of the Crooked River matter, this report might serve a purpose, and it is now sought to make it serve such a purpose. But why should anyone, in December, 1902, anticipate the need for evidence, if all is true that is now told for true?

Neither Barber, Moon nor Steunenberg, so it is represented, had had anything to do with the entries made in the preceding summer and fall. They had no concern about them, except such disappointment as resulted from learning that they had been outwitted by a lot of ill-advised entrymen who had foolishly taken lands for which there was no market. That would hardly be a reason for preserving the written evidence of their own defeat. The one material fact, from their point of view, was that the lands had been taken. The report was not needed to

prove that fact, which was sufficiently shown by the records of the land office, to say nothing of its notoriety on the streets of Boise. Steunenberg could hardly have required written evidence to demonstrate his own good faith to his associates; and if this paper was needed to satisfy them of his integrity in the matter, that was no reason why the Barber Company should preserve the document for future reference.

If, however, it be assumed that the Barber interest had procured the Crooked River entries to be made, and then intended to buy the titles from the entrymen, the preparation and preservation of this piece of evidence is thoroughly explained. If there had in fact been unlawful procurement, if there was danger of future investigation, if reasons existed why it was unwise to record the titles, then it was only the part of prudence to provide evidence in permanent form which might go in exoneration of the persons concerned.

In this view of the matter, the whole Taylor incident, which is otherwise inexplicable, is accounted for. In this light it appears why Taylor was given false plats, why he was sent upon an errand known by his employers to be bootless, why his report was taken in writing, why that report was filed at Eau Claire, and why it was so providently filed away.

PROCUREMENT OF TITLES THROUGH KINKAID.

The Taylor report was sedulously preserved for the sake of accounting for the procurement of the Crooked River lands through Kinkaid.

Steunenberg, so it is represented, on arriving at Eau Claire, on December 25, 1902, with Taylor's report, brought also the intelligence that the Crooked River lands were controlled by Kinkaid. It would seem, from the account given by Barber and Moon, that Kinkaid had been working secretly to consolidate the entries made in the preceding autumn, and had succeeded in making a pool of the titles, or obtaining an option on them, which he offered to sell in a body at \$1,000 a quarter-section. Steunenberg had not learned of this stroke until some time after Taylor's report, on the 5th of December, and before the 21st, on which latter date he telegraphed that he was coming to Eau Claire with important information concerning the North Fork, or Crooked River, lands (pp. 4503-4504-4507 to 4511).

This hostile move of Kinkaid's following upon the miscarriage of the Taylor cruise, is stated as the reason why the Crooked River lands were bought from Kinkaid. The information which, with Taylor's report, was communicated by Steunenberg at Eau Claire, on Christmas in 1902, is thus stated by Mr. Barber:

"He said that Mr. Kinkaid had secured an option or some authority from the entrymen to sell these claims, and that he, Steunenberg, had an opportunity to buy them at a price not exceeding \$1,000 a claim of 160 acres. He thought possibly they might be purchased for a little less than that, but that Kinkaid had told him that, unless prompt action was taken

by the Barber Lumber Company, he was authorized and was going to start east for the purpose of interesting somebody in the purchase of this body of claims; and Steunenberg insisted that, unless we did take very prompt action, Mr. Kinkaid would go on with his plans and we possibly would not be able to secure this desirable tract of timber" (p. 4507).

This account of Kinkaid's concern in the affair differs materially from that given by Kinkaid himself. The latter represents that he had nothing to do with procuring any of the entries in the Crooked River region (pp. 4286-4287), although he knew in the fall of 1902 that Downs was making locations in that country (pp. 3778-4287) and had himself "prepared the filing papers for quite a number of those people" (p. 4277).

The fact is, that Kinkaid prepared the application papers for 42 of the 79 applicants who filed between August 27th and October 17th, 1902, and that in the 34 successive cases initiated on and after September 13th, Kinkaid prepared the papers in all but four, and in 10 other of these 79 cases, the papers were drawn by Pritchard, and in five by Wells. (See Appendix C and D).

Kinkaid had also, as he states, been in the habit of referring those who inquired about the timber lands to the Crooked River tract, in which Downs was then operating. (pp. 4285, 4286).

Kinkaid thus proceeds to explain his connection with the sale of these titles:

“Some of them told me that they would like to find a purchaser, and I presume some one knew that I had purchased some of the timber up in Boise Basin, quite likely they did, and had at least heard it because it was known at that time I had, and I told them I couldn’t do it.

“Didn’t know of any person that I could sell to.

“And long about the first part of February, Governor Steunenberg came to me and wanted to know what there was in that tract.

“I told him I didn’t know. I wasn’t there, never had been there, and he said that they hadn’t got enough lands in the Boise Basin, and, while it wasn’t in his contract in any way to furnish any lands outside, because he hadn’t furnished enough in the Basin for a big operation at Boise to put in a great mill there, that he would like to take something to his people, meaning the Barber people, that would help out their deal, and I told him that I didn’t know, anything about the timber land there.

“I had been up past Kempner’s, but I never had been into that timber, and it was then winter and that country was impassable, unless upon snow shoes, and I don’t know but he sent somebody in there.

“If he did, it was a man by the name of Taylor, I think. I remember that either then or some

time afterward Taylor was up in there, and then a messenger was sent in there to get him out of there because his brother was dying. I think that was Taylor. * * * (4278).

"Governor Steunenberg wanted me to see what I could purchase that property for, and I told him I would have nothing to do with it." * * *

"The upshot of the whole thing was that there wasn't any other purchaser that had money to pay there except Governor Steunenberg, who had the money with which the titles—or could get the money with which the titles were taken to Mr. Rand. * * *

"And about the 11th day of—either the 10th or 11th day, or 9th, some place along there,—of February, Governor Steunenberg said that he would pay me \$800 down for all the titles that I could purchase out there on Crooked River." (pp. 4279-4280).

Kinkaid thought that \$800 was not enough, because he would have to pay at least that price to the entrymen, and it was finally agreed that he should pay \$800 for each title, and that Steunenberg should pay him \$950 when as many as fifty titles should be secured (4282-4283) Kinkaid, accordingly, in February began to buy at \$800, and in April or May, 1903, Steunenberg began to pay him the additional money necessary to make the difference between that price and \$950 per title (4280 & 4284).

It thus appears, if Kinkaid is to be believed, that

he did not at any time consolidate the Crooked River claims and offer them to Steunenberg, but that, on the contrary, the proposition to buy the titles came from Steunenberg himself, and that Kinkaid, always reluctant where timber lands were concerned, was almost dragooned into Steunenberg's agency. (4275-4276).

It also appears that the first negotiation between Steunenberg and Kinkaid was, not before Christmas in 1902, but in the first week of February, 1903. Kinkaid is particularly insistent upon this date; he recalls that there was snow upon the ground, and that he began to take deeds between the 9th and the 11th of the month. It was about the time of Taylor's second excursion to Crooked River, which appears elsewhere to have been near the end of January, 1903 (4278-4277).

The two accounts, that given by Barber and Moon and that given by Kinkaid, can not stand together. If what Kinkaid says is true, Steunenberg could not have gone to Eau Claire at Christmas of 1902 with the intelligence, stated to have been in his possession on December 21st, that the Crooked River entries had been pooled in Kinkaid's hands. At that time, Kinkaid, according to his testimony had no dealings whatever with the entrymen, beyond recommending them to locate on Crooked River and preparing their applications, and was resolutely refusing to assist them in finding a purchaser for their lands. In that view of the case, the letters put in evidence, under dates of January 2, 1903 (4511), December 29, 1902

(4514), and January 6, 1903 (4515), in which references are made to the "Kinkaid entries," the "Kinkaid lands" (4523), and otherwise to Kinkaid, must be taken as sheer fabrications (4526).

On the other hand, if what Barber and Moon say is true, then Kinkaid is guilty of willful falsehood. Granting that he might be mistaken as to the exact date at which Steunenberg opened negotiations with him, he could not have been mistaken as to the fact that the overtures came from Steunenberg, and he could still less have been mistaken in denying the fact that he himself had before that time formed the entrymen into a pool. In these matters of substance, which must have been clear in his memory, he is clear and positive, swearing that he never even thought to make a combination of the claims and that he did not begin to negotiate the purchase of their claims until after Steunenberg had urgently solicited him to do so, and had overcome his indisposition in that regard.

Even in the matter of dates, Kinkaid is so positive as to preclude the possibility of inadvertant error on his part. It was "about the first of the year 1903" (4277), that some of the entrymen were trying to sell their Crooked River lands. He did not then know of a possible purchaser. (p. 4278). He was not approached by Steunenberg until "the first part of February." He then knew nothing of the lands, and it was impossible to learn anything because "that country was then impassable unless upon snow shoes." (4278). He was, therefore, unable to give

Steutenberg any advice, although this was at least six weeks after Steutenberg had learned that Kinkaid had formed a combination of entrymen, and was holding the land at \$1,000 a claim. It was on the 9th, 10th or 11th of February that Steutenberg agreed to pay \$950 a claim for 50 claims (4281). To this extent Kinkaid is corroborated by the contemporary correspondence, there being offered by the defendants a letter from Steutenberg, dated February 12, 1903, in which he says:

“Commenced buying Crooked River yesterday morning. Have taken about thirty up to tonight.” (p. 4526).

It is impossible to reconcile these conflicting accounts of Kinkaid's share in the Crooked River case, or to accept either of them in its entirety. But the truth can be reached by comparing the two versions with each other and with what is otherwise established with reference to the existing situation.

Barber, Moon and Steutenberg had, possibly early in September, and almost certainly in May, determined to acquire the Crooked River lands. Either because scrip was too expensive or because it was difficult to obtain, they desired entries to be made. They had acquired the titles in the Basin in the summer of 1902 at a maximum price of \$5.00 per acre, as they stated it, the fact being that in most cases the entrymen were paid \$650 or less for each quarter-section. There was no reason to suppose that entries on Crooked River could not be had on the same or more moderate terms, there being then no market and no

prospect of competition. Entrymen to the number of 79 were procured to initiate titles between August 27th and October 17th, taking all or most of the available lands between the North Fork of the Boise on the east, and Crooked River, on the west, and above the junction of those streams.

In this procurement Kinkaid had been employed. He had been one of the chief factors in the procurement of the Basin entries in the preceding season, he had handled the money used in that operation, he was known in the community, and he was recognized as being in the business of locating entrymen. As he modestly states it:

"I presume someone knew that I had purchased some of the timber up in Boise Basin, quite likely they did, and had at least heard it because it was known at that time that I had."
(p. 4278).

Kinkaid states also that he "might have referred some of these parties to the Crooked River tract" (p. 4285). With like diffidence he says that he "likely had prepared the filing papers for quite a number of these people" (p. 4277). The fact is that he prepared papers for at least 51, and his associate, Pritchard, for at least 10 of "those parties," so that, from the parity of his uncertainty in respect of both matters, and considering the testimony and character of the Crooked River entrymen, the conclusion is almost irresistible that he and Pritchard had been instrumental in procuring at least 60 of the entries.

In consequence of Kinkaid's agency in the procure-

ment of the Crooked River entries, it was but natural that they should be known as "the Kinkaid entries," and the lands as "Kinkaid lands." In a letter dated January 2, 1903, Mr. Barber answers a letter written by Mr. Carson on December 29, 1902, both letters being chiefly concerned with the question, whether it was practicable to float logs down the North Fork of the Boise above the confluence of Crooked River. Mr. Barber says:

"Of course, there can be no question on this point from the mouth of Crooked River, on which stream most of the Kinkaid entries are made" (p. 4511).

The significance of this passage lies in the fact that Carson should, at so early a date, have been assumed to know that the entries on Crooked River were "Kinkaid entries."

Until the 25th day of December, four days before the date of Carson's letter, Barber had, so it is said, known nothing at all of Kinkaid's connection with these entries. Mr. Carson lived at Burlington, Iowa, and his letter of the 29th was written from that place. If Mr. Barber's first knowledge of Kinkaid's combination was acquired from Steunenberg, then, in order that Mr. Carson should, on January 2nd, understand what was meant by the "Kinkaid entries," a letter reporting Steunenberg's intelligence must have been sent to Burlington within a day or two after Steunenberg's arrival at Eau Claire on the 25th. There is no evidence in this transcript of any letter apprising Carson that Kinkaid had so interjected

himself into the Crooked River situation that the entries in that region should be collectively known as the Kinkaid entries.

There is, however, in evidence a letter from Barber to Carson, written on the 26th of December, to which Carson's letter of the 29th was obviously an answer. In this letter Mr. Barber begins:

"Governor Steunenberg reported here yesterday. * * *

"He says there is no stir or excitement around Boise, and that he will have no difficulty in getting all we want on his return" (pp. 4714-4713).

Although this letter is mutilated in parts, the remaining portion says nothing whatever about Kinkaid, and does not even vaguely suggest any reason for designating the Crooked River lands by his name. Nor does the optimistic style of beginning, or indeed any other passage, indicate that Mr. Barber had been, only the day before, shocked by disastrous intelligence which threatened to defeat his plans in that region, or that the report enclosed was the Taylor report.

It will scarcely be suggested that Mr. Barber, being on the 26th advised that Kinkaid had forestalled him in respect of the Crooked River lands, wrote between that day and the 29th another letter to enable Mr. Carson to understand why those lands should be called the "Kinkaid entries."

It results that the Crooked River entries were known in the councils and confidential correspond-

ence of the Barber Company, as the "Kinkaid lands" before Steunenberg went to Eau Claire in December of 1902. It is clear that, before Christmas in that year, Kinkaid had been so connected with these lands, and that the officers of the company so well knew of such connection, that the Crooked River entries were, as a body, identified by the use of his name.

Falsus in uno, falsus in Omnibus. Mr. Barber's letter of January 2, 1903 (p. 4511), demonstrates the falsity both of Kinkaid's denial that he had been concerned in the making of the Crooked River entries, and of Barber and Moon's pretense that they did not, until Christmas of 1902, know of Kinkaid's concern in those entries. These facts are the corner **stone**, respectively, of Kinkaid's account of his share in the transaction, and of Barber and Moon's account of the whole transaction. If Kinkaid had, in fact, been concerned in the Crooked River entries so deeply that they were known, before December 26th, to Carson, in Iowa, as the Kinkaid entries, his whole story is presumably untrue, since he swears that he had nothing to do with the entries before the following February, and if Barber and Moon, before Steunenberg came to Eau Claire at Christmas, knew the lands as the Kinkaid entries, then their account of Steunenberg's visit infects their whole testimony with untrustworthiness.

A close examination of the correspondence which is offered as occurring in the first few months of 1903 develops additional evidence of previous correspondence between Kinkaid and the Barber interest, and at

the same time explains the nature of the adverse combination which is sought to be attributed to the machinations of Kinkaid.

On February 13, 1903, Steunenberg writes:

"I have not been able to proceed as rapidly in the purchase of titles on Crooked River as had been my intention.

"Kinkaid represented for the last month that the situation was critical, and that there has been considerable scurrying to and fro on the part of grafters and other interests that want to gain a foothold in that section.

"Up to the present time my investigation of the adverse interests leads me to the conclusion that they have no matured plans in mind, but that they wanted to get a group of claims and then endeavor to procure a sale.

"I think we have everything well in hand and know we control the situation" (p. 4528).

This shows that Kinkaid had been, since the middle of January, advising and co-operating with Steunenberg in the interest of the Barber Lumber Company. Kinkaid represents that he had not been approached by Steunenberg until the first week in February, while it now appears that, as early at least as two weeks before, he had been concerned lest the Barber interest should be defeated by adverse influences, all of which pre-supposes, not merely an alliance between Steunenberg and Kinkaid, but an actual interest on the part of Kinkaid in securing the lands to the Barber Company.

The correspondence passing at the middle of January, 1903, shows much solicitude both at Boise and at Eau Claire, concerning other matters, but discloses little of dealing, and no trouble at all, with Kinkaid: See the letters at pages 4509-4510-4511-4514-4515-4516-4517-4518, *et seq.* On January 17, 1903, Steunenberg reports the antagonistic operations of Mr. Schofield, formerly governor of Wisconsin, who was, and had been, endeavoring to buy timber lands in Idaho, and the letter says:

“While I don’t believe he is ready to buy, the work his crowd is doing is very annoying, as the entrymen are pushing Kinkaid to take their claims, thinking that he, Kinkaid, is doing business with and for Schofield” (p. 4516).

Governor Schofield’s operations in Idaho are a matter of frequent mention and of much anxiety in the correspondence for several weeks. An attentive reading of the letters will show that it was really the adverse interest of the Schofield concern which created doubt as to the Barber Company’s ability to secure the “Kinkaid lands” and not at all any antagonism or infidelity of Kinkaid himself, merely a doubt whether Kinkaid could hold his entrymen in line.

It appears also that certain enterprising speculators, residents of Boise, including perhaps some of the Crooked River entrymen, had formed ideas of possible profit to themselves in the making of a combination which should enable the lands to be sold under the advantage of competitive bidding. The entry of the Schofield interest upon the field afforded for a time

the prospect of setting rival purchasers against each other, and encouraged one or more feeble efforts to create a pool of the entries.

The letters just cited show that the sole anxiety of the Barber Company was in relation to these adverse influences, and that Kinkaid was giving interested aid and comfort to Steunenberg in the latter's endeavor to hold the entrymen to the cause of the company. On February 13th, as has been shown by a quotation, *supra*, Kinkaid had been for a month advising Steunenberg that the situation in respect of the Barber purchase was critical. On January 17th, (**Letter supra**), a month before, the entrymen were urging Kinkaid to buy their lands, supposing that he was acting in the interest of Schofield, whereas he was then in co-operation with Steunenberg.

On January 18th Steunenberg reports of Schofield:

"The only move he has made in this direction was what I had outlined yesterday, namely: some of his crowd of local grafters are making overtures to the Crooked River entrymen." (pp. 4517-4518).

On February 3rd Steunenberg writes that:

"A local attorney here named Tipton, is at work among the entrymen offering quite a considerable advance over the Kinkaid arrangement." (p. 4525).

This letter shows, that adverse influences were opposed to Kinkaid's "arrangements" and Kinkaid's interests, and it shows also, that Kinkaid had before the 1st of February, entered into some agreement

with the Crooked River entrymen for the sale of their lands to the Barber Company.

On February 14th, 1903, Steunenberg writes:

"Am informed by Kinkaid that the combine is broken and he is taking titles of affected ones. Have taken 33 titles on Crooked River up to this morning." (pp. 4528-4529).

And on the 18th, February, 1903, he reports final success and the disappearance of all ground of anxiety, saying:

"Have taken 53 titles on Crooked River to date.

"The adverse movement here didn't last long after we commenced buying, but it was sufficient to cause some apprehension.

"The parties in the movement represented that they were backed by New York capital, and that the same outfit had purchased many thousands of acres in Oregon within the last two years.

"They went so far as to send a man in there (Crooked River). He came out a day or so behind Taylor." (p. 4530).

These letters, if they can be accepted as **bona fide** correspondence, show that Kinkaid, so far from antagonizing the Barber interest, was throughout consistently and with serious concern acting in support of that interest, and that such apprehensions as were entertained grew from the efforts of opposing interests and "local grafters" to disturb arrangements which Kinkaid had made on behalf of the Barber Company.

Reverting to Steunenberg's visit to Eau Claire at Christmas in 1902, the same letters afford explanation of his purpose at that time and of the occasion for his going.

One of the reasons for his sudden expedition did, undoubtedly, have some relation to Kinkaid. Final proofs in the cases initiated in the fall of 1902 began to become due early in December; in fact two or more such proofs were made late in November. Speaking of this period, which he fixes as "about the first of the year 1903," Kinkaid says:

"Some of those people were trying to sell timber lands up in the Crooked River tract, and there had been a lot of agitation out in Oregon and elsewhere about timber lands, that it was illegal to have timber lands or to do anything with timber lands, and people had no sooner gotten their lands until some of them wanted to sell, and I understood that those people wanted to sell, and some of them came to me. I likely had prepared the filing papers for quite a number of those people" (p. 4277).

Neither in 1902, nor in 1903, nor in Oregon, nor elsewhere, was there ever any notion that it was "illegal to have timber lands or to do anything with timber lands." In Oregon, at about that time, there was some agitation, and some Governmental prosecutions similar to those now in progress in Idaho, looking to the punishment of those who had made such entries under illegal agreements for the sale of the lands involved. It appears, from a subsequent

letter of Steunenberg (p. 4525), *supra*, that Kinkaid had made some "arrangements" with these entrymen, looking to the acquisition of their lands at a price which Tipton afterwards attempted to overbid. It may well be that these entrymen felt some concern and resorted to Kinkaid for advice and assistance, and it appears that, shortly afterwards, certainly after the middle of January (Letter of January 17th, p. 4516, *supra*), some of them were urging Kinkaid to buy their lands to make good his bargain with them. This urgency, and the need of providing funds to make good Kinkaid's arrangements with the entrymen, no doubt was one of the matters which Steunenberg deemed worthy of a personal conference with his principals at Eau Claire in December, 1902. Perhaps the growing insistence of the Schofield interest may also have had something to do with his conviction that an interview was necessary, and mention of the Schofield interference is made in Mr. Barber's letter of the 26th, reporting to Mr. Carson the information brought by Steunenberg on the day before (p. 4714).

The controlling reason, however, which prompted Steunenberg's Christmas visit to Eau Claire, appears, from the correspondence itself, to have been the projected acquisition of lands in the Crooked River district, additional to those already entered, and lying beyond the region in which entries had been made.

An option upon a mill site had been in negotiation before Christmas, and was afterwards actually se-

cured, as appears from Taylor's testimony (), as well as from the correspondence in the early part of 1903. The question in agitation in January of 1903 was as to the possibility of obtaining this option and the ulterior desirability of building the mill, and the practicability of the mill depended upon whether or not the timber on the North Fork beyond the Crooked River region was sufficient to warrant extensive operations. The option ran out in March, 1903 (p. 3987).

Mr. Barber's letter of December 26, 1902, (pp. 4713-4714), opens with mention of this mill site question as the particular matters suggested by Governor Steuenberg's visit. Steuenberg appears to have come in response to a telegram which directed him to wait until the option had been secured, but which he misunderstood as requesting his immediate presence at Eau Claire. His telegram of the 21st, December, (p. 4511), saying "Start tonight. Have important information concerning North Fork," was in answer to Barber's misunderstood telegram, and was not, as is, at least by implication, testified, prompted by the discovery embodied in Taylor's report dated sixteen days before, and the information concerning North Fork was in regard to the stream of that name and not at all in regard to the Crooked River entries.

All this abundantly appears not only from subsequent letters, but even from the Barber letter of the 26th. Although this letter is mutilated in all of its parts, which are most likely to be significant, and

particularly in those relating to the Crooked River entries, sufficient remains to show that the writer's chief concern was in relation, not to the entries already made, but to the possibility of procuring additional entries in sufficient numbers to justify the building of a mill.

Mention is made of "unsurveyed Government lands" (p. 4714); and, in the torn context there remains the suggestion of something or of somebody that was "menacing" some interest of the writer. A sentence, evidently referring to Steunenbrg, begins, "He reports," but the remainder of the page, which would show what he reported, is torn out. The next intact passage shows that Steunenbergr has been instructed to buy "these claims at not more than the above figures, no money to be paid until land office receiver's final receipts are shown and we have had a full opportunity to prove the correctness of Downs' estimates by our estimating" (p. 4714).

If this relates to the entries already made on Crooked River, it involved the bargaining for claims before final proof, which was then considered and which was, as Mr. Barber was advised, criminal.

The "Downs estimates," if they referred at all to the lands already entered, certainly included the additional land in contemplation beyond those presently acquired. Downs is said to have reported 314,000,000 feet tributary to the North Fork (p. 4715), at 10,000 feet to the acre. This estimate would cover 31,400 acres. At 12,500 feet, (p. 4801) it would require more than 25,000 acres. The area already ap-

propriated by the 79 claims then subsisting was not over 12,640 acres, or but little more than half the acreage requisite to support the Downs estimate. Necessarily, therefore, the subject of consideration extended far beyond the scope of present acquisition. This inference is confirmed beyond question by the concluding sentence of the letter:

“If these reports are anywhere near true, and we can secure 150,000,000 on the North Fork, already filed upon, at less than 60 cents per thousand, with the prospect of 150,000,000 more, together with the mill site on the river, we will be pretty well fixed after all” (p. 4716).

And also the significant fact that in the same letter he announces that he had written Senator Quarles to know if he intended to push his bill to repeal the Timber and Stone Act at that Session of Congress, (p. 4716). See also letter to Senator Quarles written same day (p. 4811).

In explanation of this Mr. Barber says:

“Of course, this whole first part of the business refers to the Crooked River situation. The Crooked River is variously referred to as the property on the North Fork or the Crooked River country, but some of the correspondence calls it the Kinkaid tracts. This must have been Taylor’s report that I referred to as having sent to him” (p. 4716).

The letter does not, in its first part, refer at all to the Crooked River entries already made, except to re-

cite Steunenberg's assurance that the situation at Boise is quiet and that all can be obtained that is desired (p. 4714). Nor can it refer to the "Kinkaid tracts" alone, if by this is meant the district to which Kinkaid's operations had theretofore been limited, since the acreage upon which Kinkaid had any possible hold would not afford half the timber in the writer's contemplation, and, if that is all that was in mind, there was no occasion to direct Steunenberg "to devote his entire time and energy" to securing it, since, even upon Barber's own statement, all that was necessary or possible was to negotiate with Kinkaid, and moreover, to that end there was no need and no use to "buy a little scrip" (p. 4715). Neither would there have been any thought of obtaining 150,000,000 feet additional to the 150,000,000 "already filed upon."

The fact is, as is shown by other appts of the same correspondence, that the "Kinkaid tract" was nothing more or less than the limited region in which entries had already, in and before October, been initiated. In Barber's letter to Carson, dated January 2, 1903, one week late than the one just quoted, he shows that the question most urgent and paramount to all others was in relation to the navigability for logs of the North Fork and this question was important solely because of its bearing upon the contemplated acquisition of additional lands on the upper reaches of the North Fork. The letter begins:

"I am in receipt of your letter of the 29th, and note your suggestion as to having the

North Fork of the Boise River carefully examined to ascertain how far up the river it is drivable. Of course, there can be no question on this point from the mouth of Crooked River, on which stream most of the Kinkaid entries were made" (p. 4511).

Now Crooked River and the North Fork are distinct streams, though the two names are confused in the testimony in their use to designate the body of land entered through Kinkaid. Crooked River is an affluent of the North Fork, and the latter extends far beyond the point of junction and in a different direction from the course of Crooked River. Mr. Barber's letter just quoted shows, not only that Mr. Carson knew before Christmas of 1902 what was meant by the "Kinkaid," entries but that the "Kinkaid lands" were limited to a district lying just above the confluence of the two streams.

The sole perplexity, on January 2nd, of Mr. Barber was as to the means of exploring the ulterior reaches of the North Fork for the sake of determining the advisability of buying a mill site and acquiring an additional acreage to that already secured by Kinkaid near the mouth of Crooked River. The whole letter of that date is devoted to this matter, and it is stated that Taylor has been provisionally determined upon for that purpose (pp. 4512-4513).

The correspondence for the next two months bears chiefly upon the same question, and shows that very little attention was given to the acquisition of title to the Kinkaid entries (pp. 4519-4520-4521).

The January expedition of Taylor appears to have been undertaken, not for the sake of estimating the lands then under entry, but to ascertain the extent of other timber, and the availability of the North Fork for logging operations. On January 21st, 1903, reporting the departure of Taylor, Steuenberg devotes substantially all of his letters to the possibilities of navigation (pp. 4520-4521-4522), and Taylor himself testifies that the reason given to him for such unreasonable cruising as Steuenberg insisted upon was that it was necessary to determine what disposition should be made of the mill site option which should expire in March (p. 3986).

Taylor's first excursion, indeed, seems to have been prompted by the same desire to ascertain the practicability of securing additional lands to those taken by entrymen in the fall of 1902. This report of December 5, 1902, (p. 3991), deals with the availability of Crooked River for floating logs and with the general character of the timber quite as fully as with the unanticipated making of entries in the region between that stream and the North Fork, the entries being only incidentally mentioned and only those in a single township were mentioned at all. If the report is a **bona fide** document, it is of use only so far as it states facts bearing upon further acquisition. That it was regarded in this light appears from the fact that Barber enclosed it in his letter of December 26th to Carson, in which nothing at all is said about the discovery that entrymen had anticipated the scripping of the land and much is said about the extension of operations:

"I also hand you report of estimator employed by the Governor to work on North Fork, which explains itself. We have prepared a little map showing location of lands already secured by * * * entries, etc., and have shown where the remaining timber on this river is located as reported by Downs. This report shows 314,000,000 tributary to the North Fork, etc." (p. 4715).

The report enclosed, Mr. Barber states, (p. 4717), was Taylor's report of December 5th. This report certainly does not explain itself, if by that is meant that it elucidates the situation in respect to the extent and manner of the appropriation already made of the Crooked River lands, nor does it explain why they should be spoken of as the "Kinkaid entries," a fact of which Mr. Carson had before been in some way apprised. Nor does either the Taylor report or the Barber letter show the "location of lands already secured by * * * entries, etc.," and "where the remaining timber on this river is located."

Manifestly, in order to construct such a map as was enclosed, Steunenberg must have brought much information additional to that embodied in Taylor's report, and more too than is given in the fragments of Barber's letter of December 26th, and more even than was afforded by Downs' estimate of 314,000,000 feet. Manifestly, also, the thought predominating in this letter, as in all the ensuing correspondence, was, not how to get from Kinkaid "the lands already secured by * * * entries," that is "the 150,000,000 on the

North Fork already filed upon," but whether or not to sieze the opportunity to acquire the 150,000,000 feet reported by Downs as standing beyond the region already appropriated.

It is further manifest, from the same letter, that the so-called "Kinkaid entries" had been acquired December 26, and that their acquisition had been bargained for and definitely settled before that date. Mr. Barber speaks of "the 150 millions on the North Fork already filed upon." The area then appropriated was a little short of 12,500 acres; the accepted estimates allowed 12,500 feet to the acre; and the 150,000,000 feet which Barber had in mind could not have been any other timber than that standing upon the lands filed upon in the preceding autumn. Not only does the letter reckon with manifest confidence upon these lands as safely acquired, but they are expressly described as "the lands already secured by * * * entries." Clearly Mr. Barber could not have written with as much assurance of entries of which he had first heard only on the day before, and of which his only information was that they had been pooled in the hands of Kinkaid, with whom no negotiations had as yet been initiated.

Steuenberg left Eau Claire between the 26th and the 29th of December, and, instead of hastening to Idaho to close with Kinkaid, went to Washington. On January 5, 1903, he wrote from that city to Barber, a letter, which Mr. Barber promised to look up, but which was not produced (p. 4721). On the 7th, Jan., '03, Barber wrote to Steuenberg at Knoxville, Iowa, saying:

"I have your letter of the 5th from Washington and note fully its contents and am glad you have adjusted matters with the authorities." (p. 4721).

Notwithstanding Steunenbergs had gone east from Eau Claire before December 29th, the transcript shows a letter purporting to have been written on that day and addressed to Steunenbergs at Caldwell, Idaho, which begins:

"In making the deal with Mr. Kinkaid, have the deeds to run to A. E. Palmer, the same as the other lands you have been buying for us. We are exceedingly anxious to have everything pertaining to the Barber Lumber Company's plans pushed with all the energy possible from now on." (p. 4514).

Again, on January 6, 1903, another letter purports to have been addressed to Steunenbergs in Idaho, beginning:

"We are of course much interested in learning what action you took with Kinkaid, etc." (p. 4515).

It is impossible to suppose that Steunenbergs, in leaving Eau Claire for Washington, failed to inform Barber of his destination, and that Barber believed that Steunenbergs was in Idaho on December 29th or on January 6th. What, then, is the meaning of the enquiry on the latter date as to what "action you took with Kinkaid," when the writer very well knew that Steunenbergs had not seen Kinkaid, and could not have communicated with him? Why should Steun-

enberg be addressed at his home when it was known that he was in Washington?

Steunenberg, certainly, was not much concerned about the proposed negotiation with Kinkaid for the Crooked River lands, else he would have gone directly to Boise to close the matter, which is represented to have been critical and urgent, and would not have postponed the securing of those lands for the ten days or more which he spent in Washington and in Iowa.

The inference is, that the action which Steunenberg "took with Kinkaid," whatever that action was, had been taken before Steunenberg went to Eau Claire. At all events, the situation was evidently regarded as secure and requiring no such haste as was implied in Steunenberg's telegram of December 21, 1902. The "important information concerning North Fork," which is mentioned in that telegram as the occasion for the sudden trip to Eau Claire, must have related to the stream of that name and to the proposed extensive operations, and not at all to the Crooked River entries.

The Court is solicited to re-read the testimony, (pp. 4503-4515), and the included correspondence, in the light of these facts. The statement, on page 4503 of Steunenberg's visit to Eau Claire and what he said on that occasion, is almost positive to the effect that he came to Eau Claire solely on account of Taylor's discovery that the Crooked River lands had been appropriated by entrymen, that the preliminary telegram of the 21st was sent with that information in

the writer's mind, and that the only subject of conference was the feasibility of buying the titles from Kinkaid. The impression thus sought to be made is necessarily inconsistent with the facts shown by the subsequent correspondence; with Kinkaid's testimony; with Carson's knowledge of Kinkaid's concern in the entries; with Barber's letter of December 26th; and with Steunenberg's immediate trip to Washington.

The letters of December 29th and January 6th are plainly inconsistent with the fact that Steunenberg was in Washington.

THE LATER ENTRIES ON CROOKED RIVER.

The letter written by Barber to Carson on **December 26, 1902** (p. 4715), effectively negatives the defendants' assertion of previous intention to locate scrip upon the lands taken by entries in the preceding summer and autumn.

Not only does the letter fail to mention the inclination concerning those entries alleged to have been secured before that day by Kinkaid, or to express any disappointment at the defeat of the supposed purpose of scripping, but it shows that the only intention, at any time, of using scrip, was contingent upon an inability to procure entries.

Referring to the Quarles bill to repeal the timber land law, the writer says:

"I have written Quarles if it is his intention to push this bill through this session. If it is, should we not **buy a little scrip if we can find**

it at a reasonable price; we shall have our six thousand acres in time and we will not use any of it in the Basin awaiting further developments at Washington" (p. 4715).

This sounds very strange coming from the man who, according to his testimony, had been intending for at least four months to locate scrip on the Crooked River lands; and it is utterly inconsistent with all the testimony to show that the writer had, only the day before, been shocked to learn that he had been anticipated in that purpose by a lot of independent entrymen.

The immediate context of the passage quoted states that the writer has instructed Steunenberg to hold up for the present all matters in the Basin and to devote all his energy to securing timber tributary to the North Fork "along the lines herein set forth." Then follows the hopeful expression, already quoted, about securing 300,000,000 feet, including the 150,000,000 "now filed upon," that is to say, the lands elsewhere in the letter mentioned as "already secured by * * * entries"

If, therefore, scrip was intended to be used, it was upon the lands, additional to those "already secured," and lying further up the North Fork, which it was contemplated to acquire in order to complete the 314,000,000 feet reported by Downs.

At the date of this letter, there had been no claims initiated in the Crooked River district for more than two months. For reasons indicated in the evidence, and which have been suggested in the foregoing

statement, the rush to that region had terminated abruptly on October 17th, 1902. Since that date Sharp had been seen by Senator Foster, and for more than a month had manifested a change of heart. The "Kinkaid entries" had been unreported, the entrymen were pushing Kinkaid to consummate his "arrangements," and Steunenbergh was, as the letter was written, on the point of departing for Washington to "adjust matters with the authorities" (p. 4571). In these circumstances, Mr. Barber was optimistic as to the future, and resolving to expand his enterprise toward the further regions of the North Fork.

The only cloud upon the horizon was the threatened repeal of the timber land act, the statute which had made possible all that had theretofore been done. To meet that contingency, it was proposed to "buy a little scrip," and to use the purchase in connection with the 6000 acres of scrip held unused since the preceding August.

In the next month Taylor and Downs were sent upon snow shoes to reconnoiter the North Fork region with reference to the advisability of buying the mill site, and to ascertain the sufficiency of the timber to justify further expansion in that direction. Their report seems to have been favorable. At all events, the expansion took place. But it did not necessitate the use of scrip.

No scrip was bought. No part of the 6000 acres on hand was located in the Crooked River country or elsewhere on surveyed lands until February, 1904, or on unsurveyed lands until November, 1903, (pp.

4631- 4635). The timber law was not repealed. The entries already made were not suspended, adversely reported, or otherwise molested, and all the additional land acquired in Crooked River was acquired through a fresh series of entries.

On February 12, 1903, Joseph Sullivan and his wife filed applications for tracts in the Crooked River region. They made proof on May 7th, on May 14th, 1903, both conveyed the lands to Rand, by whom subsequent conveyance was made to the Barber Lumber Company. The application papers of Sullivan and his wife were drawn by Pritchard and their deeds by Kinkaid. (pp. 5040-5041. Exhibit 87 J. 3134-5, 3304).

No further applications were filed until April 22, 1903, when Weasel and York initiated entries. Their application papers were drawn by Kinkaid, who also drew the deeds by which both conveyed to Rand (See Appendix D).

On May 29th, 1903, six additional applications were filed for lands in the Crooked River District; several followed in July and others in August, and by the 15th of August there had been filed twenty-five applications. In thirteen of these cases it appears that the initial papers were drawn by Kinkaid, and in three by Pritchard. With respect to the residue, the transcript fails to show who were concerned in the preparation of the papers (See Appendix D).

Here then, was an area of 4,000 acres, entered in the spring and summer following Mr. Barber's letter of December 26th, 1902, in which he proposed to buy

scrip for location on the Crooked River lands. The earliest of the applications were not filed for more than six weeks after the date of that letter; the next two were six weeks after that, and the subsequent entries did not begin until the end of May. (See Appendix D).

The Barber Company had practically five months in which to acquire the land by scrip, and it had, at that time 6,000 acres of scrip in its treasury.

The necessary inference is that the Company did not desire to locate scrip. If there was ever any intention to do so, that intention was abandoned because the procurement of the entries was found to be more advantageous.

This failure to use scrip after Christmas of 1902, and to secure the remaining lands on Crooked River, is not attempted to be explained by anything in the testimony. Assuming that there was a purpose to scrip the lands appropriated by entrymen in the fall of 1902, there is no pretence of any such purpose in relation to the later entries in the same region just referred to.

If it was not advantageous to use scrip in the spring and summer of 1903, it had not been advantageous to use scrip in the fall of 1902.

Mr. Barber's intention, on December 26th, 1902, was expressly declared to be based upon the proposed repeal of the timber land law. If, in view of that legislation, he did not, in fact, buy and locate scrip, but resorted to entries to secure the additional area desired, it is unreasonable to suppose that he intended

to use scrip four months before when no such legislation was in prospect.

If the company, desiring to obtain the additional Crooked River lands, did not use scrip when it had scrip, when the timber land law was about to be repealed, and when there were no entrymen to prevent, but resorted to entries instead, the only reasonable conclusion is that, in the preceding fall, it did not want to use scrip, but in preference procured entries to be made.

Neither Barber, Moon, nor Kinkaid, in their elaborate explanation of their connection with the Crooked River lands appear to have thought of this secondary series of entries. All have overlooked the fact that later entries in that region were separated from the first series by a hiatus of six months, and they have assumed that the Court, too, would overlook that fact, and would also overlook what occurred in the interval.

Kinkaid says that he was employed by Steunenberg about the 10th of February, 1903, to buy the existing titles which then numbered seventy-nine. He admits buying ninety-four (p. 4285), and it appears that, in five other cases the deeds were drawn by Pritchard, so that the two men must have secured at least twenty titles initiated after Kinkaid was employed; as to these later cases, all of Kinkaid's detailed narrative of adverse interests and negotiation has no application, all that he states having occurred before the 10th of February, and there is no explanation as to all the extensive purchases made after that

date. So of all the claims, numbering 104, entered in the Crooked River region between August 27th, 1902, and August 15th, 1903, the Barber Lumber Company acquired title to every one of them, a short time after final proofs were made upon them, with one or two exceptions (pp. ———). Every entryman was located by the locating firm of Patrick H. Downs and John I. Wells (see appendix C. and D. and pages 4096, 4101, and 4138); and the entry papers and deeds of a great majority of the entrymen were prepared by either Kinkaid, Wells or Pritchard, as has been herein shown.

Barber and Moon, in telling how virtuously they had intended to use scrip, and how grievously they were disappointed by the premature enterprise of the Boise entrymen, seem to suppose that, in thus accounting for the acquisition of the original 79 titles through Kinkaid they have covered all of the Crooked River entries, and that it is unnecessary to explain the remaining 25 cases in which also they acquired titles with the assistance of Kinkaid. If it be found in respect of these latter entries that they were the result of unlawful procurement, it follows **pari ratione** that the same finding should be made regarding all of the others.

Finally the Crooked River affair, as stated by the defendants, is constantly and in all of its details opposed by the objection which pervades the whole case, its fundamental impossibility and its necessary incredibility. It is inexplicable that all of the titles entered in the fall of 1902 should gravitate to Kinkaid

and be found neatly and conveniently collected in the hands of the Barber Lumber Company. Kinkaid tells us in effect that he labored throughout these transactions under a constitutional indisposition towards timber lands, and in respect of this case, as of the others into which he was drawn, he insists upon his reluctance to have anything to do with the acquisition of said lands. In the previous winter Kinkaid had incurred the censure of Sweet, who lost patience with him because he "was not a real estate man at all * * * was too conservative * * * and was not enough of a rustler;" and Sweet had refused to admit him to a partnership in the Basin enterprise because he, Kinkaid, did not have an aptitude for such transactions, Sweet saying, "you are no promoter; you could not sell this property" (pp. 4241-4253).

It was the very irony of fate that this unassuming gentleman, of such retiring disposition and so unfitted for commercial affairs, should be selected by everyone of the 79 entrymen who had filed in the fall of 1902 to act as agent for the sale of the 79 titles. After Kinkaid had been pronounced unfit for such a trust by his intimate friends, these comparative strangers, by some inverted instinct, sought him out and forced him into their collective service, and he found himself burdened with a mass of titles spontaneously accumulating in his unwilling hands.

In this extremity of Kinkaid's distress, by happy accident appears his old friend and ally in the affairs of the Basin, Steunenberg, and Steunenberg

brings promise of relief. He will go to Eau Claire and try to persuade Barber and Moon to take the titles from Kinkaid's involuntary custody. The trip is made to Eau Claire, and thence to Washington, "to adjust matters with the authorities," and Kinkaid is relieved.

Steunenberg did not return to Boise before the 10th of January, 1903, having been in Iowa on the 7th and after that date long enough for a letter to come from Eau Claire. By the 13th, a month before his letter of February 13th (p. 4527), Kinkaid was urging him to buy the titles, saying that "the situation was critical," and after a month of anxiety and travail of spirit the transaction was securely effected, and the Barber Company got the titles.

Such a series of accidents constitutes too great a strain upon credulity. If all the testimony upon the matter were consistent, the inherent improbability of the narrative would put it beyond acceptance. The only rational way to deal with such a state of facts is to account for it as it accounts for itself upon its face, and to find that all the Crooked River entries were procured by, and in the interest of, the Barber Company.

THE ENTRIES IN Tp. 6 N., R. 4 E.

At the beginning of the operations that are the basis of this suit, the tract of land hereinbefore referred to as Tp. 6 N., R. 4 E., was unsurveyed land.

In June, 1902, Mr. Moon as has been stated before made his first visit to Idaho, and on that occasion

brought with him Mr. Connors, a timber cruiser of Chippawa Falls, Wisconsin. This was a "general exploration trip." They examined the timber in the Boise Basin, then came down Granite Creek and upon Tp. 6 N., R. 4 E. Moon was deeply impressed with this township, because of the quantity and quality of the timber it contained, it being very desirable and the best he had seen, and also because it was situated lower down on the river and nearer Boise than any other timber he had inspected. So impressed was he with importance of acquiring this tract that upon his return to Boise he directed both Steunenberg and Palmer to have Connors cruise the same thoroughly (p. 4547). And again at the time of Moon's first visit Downs was employed and paid by Palmer \$43.50 on June 16, 1902, (p. 5240), and there is no doubt that Downs guided Moon and Connors over the Boise Basin and into the "6-4" tract.

Mr. Barber, like Mr. Moon, was also deeply impressed with the importance of acquiring this tract, and in answer to the question why Connors had cruised and estimated the entire town in 1902, said:

"It was because we saw the almost absolute necessity of handling that timber in connection with the Boise Basin proper, the great desirability of it, and we wanted to be prepared when it did come into the market to act promptly" (p. 4542).

And they discussed ways and means of inducing the then Governor of Idaho to have that town surveyed and thrown open to entry (p. 4541).

Barber, for some unknown reason, fell into the error that this township would be open for entry on July 15th, 1903; telegraphed on July 2nd, to Steunenberg, who was at Boise, as follows:

“Cannot leave here for two weeks. Do not neglect town 6, range 4, the 15th.” (p. 4559).

On July 15, 1903, the approved plat of said township was filed in the land office at Boise, and in virtue of the Act of Congress regulating such matters in the State of Idaho, the State had sixty days thereafter to exercise its preference right in selecting such sections in that township as it saw fit; and upon the filing in the land office of the list indicating what lands it had selected, the land in the township not selected by the State became subject to entry by the public immediately thereafter. (p. 3009).

The selection of land on behalf of the State was made by the State Land Board, of which the governor was chairman, and the deliberations and conferences of the board as to what lands it would select were regarded by members of that body as confidential (pp. 1101-1102-1119-1127).

During the period that the board had under consideration the selection of lands in said township, Mr. Borah, the attorney for the Barber Lumber Company, on several occasions, called upon the then governor, John T. Morrison, at the latter's office, and inquired whether the State intended to select any land in that township. Upon being advised that it would, said attorney at first demurred to such se-

lection being made, and then asked if it would be possible for the State to waive any rights it had there. He then attempted to dissuade the governor from making any selection in said township, and being unsuccessful in this, and being advised that it had been decided to select 4,000 acres, he asked that that amount be reduced and that the selection be made as small as possible. He also made efforts to learn what lands were to be selected (pp. 1102-1103-1104).

That was the only instance while Governor Morrison was in office that anyone tried to learn what lands it was intended to select on behalf of the State (p. 1127).

Patrick Downs had cruised and estimated "6-4" in the spring of 1903 (p. 4016). He knew that "the company" purposed to acquire title to the land in that township not selected by the State, and after that they did not intend to secure any more land, as they had about all they wanted (p. 3922). It therefore became necessary that he be advised of what land the State purposed to select, so that he might locate persons on the several tracts that remained, and have persons ready to file thereon before it became generally known what the State would take. Accordingly, during the period the State board were considering what land it would select, and before the list thereof had been filed, Downs employed Kinkaid to find out what lands the State would select in that town. (pp. 4018-4019).

Kinkaid, in relating how he obtained this information, said:

“My recollection is I went to the Land Office first to talk to the officers there about it. I went over to the State House and called upon the Governor, and I don’t remember whether I saw him at that time, or not. I likely saw his Secretary, and asked him about the State selections, and of course the right place to go was into the State Land Office. I had first gone to the United States Land Office, of course, and I went into the State Land Office, and saw the officers and clerks there. Now I don’t know who the—I think the active head of the State Land Board was Mr. Norman Jackson, at that time, because I knew that he was in that position from news-papers, but I don’t remember that I ever knew Mr. Jackson, and I don’t know that I met him there at that time, or who it was that I met. I asked him about the selections there and the clerks, or the officer in charge there, or some one, showed me some of the titles and plat books, and I noted upon the plat which I had with me what I learned about it, but it is my recollection that it wasn’t a definitely settled proposition, that it wasn’t certain whether they would take these particular lands or not, but whatever I got there, I gave the result to Mr. Downs. I don’t know who I got that from. There was nothing mysterious about it. There was nothing adroit or shrewd in any way, and I don’t know what officer it was” (p. 4291).

The period in which the State was limited to exercise its preference right in said township expired Saturday September 12th, 1903. On the afternoon of that day, it availed itself of that right by filing in the land office at Boise a list of the lands selected, and the other lands in said township consequently were open to entry by the general public Monday, September 14th, 1903. (p. 2968).

In the evening of the Saturday that the list of the State selections was filed, and after the close of the land office, a number of persons formed in line at the door of the land office and these and others who joined them Saturday night and Sunday, remained in line until the land office opened Monday morning, when there were thirty persons in the line (p. 2970).

Of the thirty persons lined up at the land office Monday morning, September 14, 1903, the following twenty-five persons filed applications to enter each a quarter-section in township "6-4": Margaret Scully, George G. Eagleson, Mary J. Eagleson, Wheeler H. Martin, Thomas L. Martin, Anna L. Fisher, Lorin T. Kinert, Joseph Penrod, Alexander T. Ellis, Charles W. Clawson, Frank R. Martin, Joseph Ehrmantrant, Jr., George R. Avery, Andrew Campbell, Wilbert R. Reeves, Willis A. Ross, Josie N. Ross, Margaret Ehrmantrant, Harry B. Noble, Cleora M. Snow, William R. Coleman, Charles B. Farraday, Rice J. Harbaugh, John K. Woodburn and William B. Davidson; many of said persons had been procured to make the entry either by Kinkaid

or Downs. Within the week before it was known to the public what land the State would select, Downs had taken all of said entrymen, with one or two exceptions, upon the land and had pointed out to each the particular tract he or she was to file upon or enter (pp. 2972-2973-4027; also appendix E.).

The entry papers, viz., the sworn statement, non-mineral affidavit and the notice of publication of eighteen of the twenty-five entrymen were prepared by Kinkaid. (See appendix E.).

Not one of these applications conflicted with any one of the other applications or with any of the selections made by the State (p. 2974).

Kinkaid furnished a number of the entrymen who filed upon claims in said township September 14, 1903, with the money with which they made final proof. Among these were Rice J. Harbaugh, William R. Coleman and Alexander T. Ellis.

Harbaugh is a steam engineer and at that time was employed upon a ranch about three miles from Boise, owned by John T. Morgan, late Chief Justice of the Supreme Court of Idaho. (p. 2178).

Ellis is a blacksmith, and at that time was the proprietor of a shop at Boise. Coleman is also a blacksmith, and was then in the employ of Ellis (p. 2405-2406). He was a married man and his family consisted of a wife and six children (pp. 2368-2369). Harbaugh made final proof December 7th, 1903 (p. 2179). Ellis made proof December 11th, 1903. (p. 2408). Coleman made proof December 17th, 1903 (p. 2369).

The day Harbaugh was to make proof, Kinkaid asked him if he was prepared to make final proof, and when told that he was not, said: "I will see that you get the money" * * * "go down and have a talk with Alexander Ellis" (pp. 2191-2192).

Kinkaid went to Ellis' shop and handed him a roll of bills and told him to give it to Harbaugh. Harbaugh was not working for Ellis, nor was he about the shop at that time. He came in the rear door of the shop, however, a few minutes after Kinkaid departed. Ellis handed Harbaugh the money which Kinkaid had left with him for that purpose, without comment and without so much as counting the same (pp. 2413-2414).

On the fourth day after Ellis supplied Harbaugh with money furnished by Kinkaid for Harbaugh's final proof, that is to say, on December 11th, the final proof of Ellis himself became due. Ellis finding himself confronted with this urgent and apparently unexpected emergency endeavored unsuccessfully to borrow the requisite amount from one of the banks at Boise. Upon his reporting to Coleman his inability to negotiate the loan, Coleman suggested that he thought he could get the money from his friend Kinkaid. Coleman thereupon went to Kinkaid, to whom it seems Ellis himself had not thought of applying, although he had himself carried to Harbaugh from Kinkaid the money which Kinkaid had supplied for Harbaugh's final proof. Coleman obtained from Kinkaid the money which Ellis needed, and with that money Ellis made his final proof (pp. 2416-2417).

The amount furnished Ellis by Kinkaid to make final proof was deducted by the latter when the final negotiations for the transfer of the claim were closed with Kinkaid, and Ellis made a deed to Long of the same (pp. 2373-2374-2426-2437). Ellis understood that Kinkaid was doing business for some company (p. 2426).

On the sixth day after Coleman had obtained from Kinkaid the money with which Ellis made final proof, that is to say, December 17th, the final proof of Coleman was to be made. Coleman being at that time also in urgent need of four hundred dollars for that purpose, made an unsuccessful attempt to borrow that amount at one of the banks at Boise, and also from two residents of that city (2371-2374). With the assistance of Henry Ries, he borrowed four hundred dollars from Dean West (p. 2371-2375) and with that money made his proof.

The same Henry Ries and the same Dean West who, it is to be remembered, figured extensively in the basin entries two years before, and at that time had disbursed quite an amount of money for John L. Wells.

About the time of the filing of the approved plat of township 6 N., R. 4 E., in the land office at Boise, one G. D. Hoseley, of Wisconsin, arrived at Boise. For 15 or 18 years prior to that time he had been employed by the Northwestern Lumber Company, of which James T. Barber was president. Hoseley came at the request of Barber, who paid his travelling expenses.

His mission to Idaho was to go into the Basin and Crooked River country and to report to Barber the quantity and quality of the timber in that region, and the feasibility of logging and driving the timber down the stream.

At Boise, Hoseley met Barber and Steffenberg together, several days after his arrival, and Barber told him Hoseley was to be accompanied on his expedition by Patrick Downs. (pp. 2730 to 2737), and Hoseley and Downs then went into the timber country together.

Before starting for the timber country with Downs, Barber admonished Hoseley to "see what you go to look at. You go and see it, and don't take anybody's say-so about anything" (p. 2756). Hoseley and Downs were in the timber for several weeks, when Hoseley returned to Boise and reported to Barber. (pp. 2734-2735).

Within three weeks after Hoseley's arrival in Idaho, he was, on August 4, 1903, located on a quarter-section of timber land in the Crooked River region by Patrick Downs (p. 2758). His application papers were prepared by John Kinkaid (p. 2782) and he conveyed the same to the Barber Lumber Company in consideration of \$3,500 in December, 1906. (p. 5233).

Hoseley returned to his home in Wisconsin in August, 1903, and shortly thereafter, upon the request of Barber, he went to Eau Claire, Wisconsin (pp. 2735-2736), and it was on this visit in consequence of Barber's solicitation, that he accepted employment

to go to Boise and work for the Barber Lumber Company.

At the date of said employment of Hoseley by Barber, which was the tenth or twelfth of September, 1903, (pp. 2738-2759-2760-4540), Barber gave to Hoseley a tract book (Marked Complainant's No. 141 A. p. 5196) (original with clerk this Court), which Barber said contained markings indicating the holdings of the Barber Lumber Company in Idaho. This was the only book Hoseley had as a guide or chart of the Barber Lumber Company lands which he was to log over and work upon (pp. 2738-2741-2750-2771-2791). Hoseley, immediately after his visit with Barber, returned to his home at Nealsville, Wisconsin, and began preparation to move to Idaho. He started for Boise September 16, 1903, and arrived at said city September 21, 1903 (p. 2736).

Barber, at the time he gave Hoseley said book, stated to him that "they" had 500,000,000 of timber in Idaho (p. 2737).

This book contains about 50 pages, each page containing a diagram of some township. At the top of each page is marked the number of the township and the range that page represents. On the fly leaf of the book is an index in Moon's handwriting (p. 4544), and made before the book was given to Hoseley, indicating the page on which the several townships may be found. Each page is subdivided into squares representing the several sections in said township, and each section is again subdivided to represent the quarter-sections and 40-acre tracts in each section.

The "holdings" of the Barber Lumber Company are indicated in said book by small dots or straight lines, checks or v's, and cross marks or x's, written in red ink in a number of the 40-acre squares in the various sections on the several pages.

Page seven of said book represents Tp. 6 N., R. 4 E. There is no question that the township and range were written at the tops of the pages and referred to in the **index** when the book was given to Hoseley by Barber (p. 2762). Though Hoseley admits that he told Mr. Garrett, the Receiver of the land office, that the marks or dots in red ink on said page 7, representing Tp. 6 N., R. 4 E., were also there when the book was given to him by Barber at Eau Claire about September 12, 1903 (p. 2794), and that when he talked to Garrett he believed that all red ink marks were in the book (p. 2793), he is now somewhat doubtful about the accuracy of that statement. This doubt has been created because Tp. 6 N., R. 4 E., was not open for entry when the book came into his possession, and the Barber Lumber Company could not have owned said land at that time, and also because there are a number of quarter sections now marked with a check mark in said book, which were afterwards located by scrip, and also because his own claim had not been sold to the Barber Lumber Company at that time, and is now checked with a red mark (p. 2994).

In testifying in relation to the red marks on page 7 of the book Tp. 6 N., R. 4 E., in answer to the question whether the red ink marks were there when

the book was given to him, he said:

“I don’t remember whether they was or they wasn’t” (p. 2791).

On page 7, or the “6-4” plat in said book, are a number of red “dots,” and every quarter section in that township thus marked was afterwards acquired by the Barber Lumber Company, and those dots, Hoseley understood, indicated the tract that the Company would buy if it contained a certain quantity of timber (p. 2743).

At the present time there are only 990 red ink marks in the said book. They represent 247 $\frac{1}{2}$, 160 acre tracts, or quarter-sections, and considering that each would cruise 12,500 feet to the acre, there would be represented by said chart, or book, as the holding of the Barber Lumber Company in Idaho at the time the book was given to Hoseley, 495,000,000 feet, 5,000,000 feet less than Barber told Hoseley they had, and 55,000,000 feet less than Hoseley estimated was on the land indicated by said book after going over the land and increasing the estimate, on a ten per cent basis (p. 2737).

In this calculation is included the 25 quarter-sections in “6-4” or 4000 acres (marked “1”), that the company did acquire (see appendix E), and the 16 entries also marked “1” initiated on and after July 10, 1903, containing 2,560 acres, which it also secured later (see appendix D), and also the 2,640 acres of scrip for which the Company bargained September 4, 1903 (Exhibits), and which defendants say

were not located until the following October. To eliminate this 9,200 acres would be to further reduce the amount of timber that Barber told Hoseley they owned in Idaho, 115,000,000 feet, or by more than one-fourth, and Hoseley's statement in that respect is uncontradicted. Connors cruised the entire town of "6-4" for the Barber Lumber Company prior to July 26, 1902 (pp. 4542-4781 and Exhibit 143 K, original is filed with Clerk of this Court), more than a year before it became open to entry and almost a year before it was surveyed, and by a glance at his estimates made at that time (Exhibit 143—) and (Appendix E) it will be seen that the Barber Company acquired every claim that Connors reported as worth having, and the claims that Connors' estimates indicate as desirable are marked on the "6-4" plat in the Hoseley book page 7 (Exhibit 141 A.) with a "dot" or "straight mark" and Hoseley understood that the claims thus marked the company would purchase if they were "good" (p. 2740).

Barber and Moon assigned as the reason they took titles to the property they acquired in the names of Palmer, Rand and Long was that they, Barber and Moon, were well known lumber men, and Barber was generally known as a lumber man looking for a western proposition, and that should it become known that persons known as timber operators were purchasing timber land in a given locality, that fact would immediately enhance the value of timber in that region (p. 4490).

Since February, 1900, George S. Long lived at Tacoma in the State of Washington, and has been employed by the Weyerhaeuser Timber Company as its manager and resident agent. In this capacity he purchased timber lands for said company. For 19 years prior to said date Long had been employed by the Northwestern Lumber Company, of which Mr. Barber was president, as manager of the sales of that company, and at the time he resigned from said company, was paid a salary of \$4,000 or \$5,000 per annum for his services (pp. 3416, 4411, 4741).

For several years prior to 1903, Long has been engaged in purchasing timber lands for the Weyerhaeuser Timber Company (p. 4741).

On one occasion Long told Barber that he was purchasing timber and stone claims in a certain locality and he was afraid that if the owners of the claims he desired to purchase knew that the Weyerhaeuser Timber Company was buying in that locality the price would be very materially enhanced, and he asked Barber if he had any objection to Long taking such claims in his, Barber's, name (p. 4561).

Prior to December 10, 1900, Long talked with one McKnight, who was at that time the president of the Northwestern Lumber Company, and residing in Minneapolis, and who was also a stockholder in Long's company (The Weyerhaeuser Timber Company), with a view of having McKnight submit to Barber the proposition that he, Barber, permit the Weyerhaeuser Timber Company to put title to certain

property of said company in his, Barber's, name (p. 4562).

On December 10, 1900, Barber, in a letter addressed to Long at Tacoma, Washington, said:

"Mr. McKnight says to-day you had some talk with him about using my name in the purchase of some timber lands when it was thought best not to use a company's. He is uncertain whether he or I were to write you on this subject, so I do it, and will say that you may do anything short of pledging me in marriage, and I will not kick" (pp. 4563-4564).

The original letter is not produced, and the above is merely a lead pencil memorandum which Barber does not remember exactly when and where the same was made or from what place this memorandum is produced. (p. 4562)).

In a letter dated Tacoma, Washington, May 3, 1901, Mr. Long writes Mr. Barber as follows:

"My Dear Mr. Barber:

As I told you when you were out here, we were picking up a few tracts of land occasionally and pass title to you. We will probably continue to do this for some time to come down in one section of the country where we are operating. * * * * * When we are ready to have you execute the quitclaim deed, we will send you the original deeds so you can verify the document which we will send you to execute to us. In the interval thought it well to give you

a list of the lands, which stand in your name at present, all of which were purchased for the Weyerhauser Timber Company * * * * *

Yours truly,

Weyerhauser Timber Company,

By

George S. Long,

(pp. 4563-4564)

Agent."

On November 13, 1903, Barber wrote to Long as follows:

November 13, 1903.

"Mr. George S. Long,

Care Weyerhauser Timber Company,

Tacoma, Washington.

"Dear Sir:

Exigencies have arisen which make it desirable to pass the title of certain lands in Idaho through some party entirely removed from association with the Barber Lumber Company, the circumstances being similar to those which made it desirable to use my name in connection with some of the W. T., Weyerhauser Timber Co.'s property. I therefore take the responsibility of directing the placing of the title to certain lands in you. As soon as the matter reaches a final adjustment we will forward a quit claim deed to the property.

"Trusting that you have no serious objections to this, and thanking you in advance, I

remain, with kindest regards,

Very truly yours,

JAMES T. BARBER.

(pp. 3417-4565)

Prest."

To this letter Long, on November 17, 1903, replied to Barber as follows:

"Your letter of the 13th inst. at hand, and it will be entirely agreeable to the writer to comply with your wishes in the matter of temporarily being custodian of some of your real estate in Idaho" * * * (p. 3418).

When these two letters just quoted were written, no final proofs had been made on any of the entries in Tp. 6 N., R. 4 E., nor were any final proofs made in said township until several weeks thereafter. Kinkaid, at the request of Steunenberg and William E. Borah, subsequently secured all the claims in "6-4" entered September 14, 1903, for the Barber Lumber Company, and took title to the same in the name of the said George S. Long, who subsequently conveyed to the Barber Lumber Company (pp. 3788-4298-4299). That was the only property that Long held for the Barber Lumber Company.

Kinkaid was paid \$800 a claim for the said "6-4" lands and either Steunenberg or Borah (whichever one it was to whom he delivered the deeds), paid him in addition to the purchase price of the land \$50 a claim for his service (p. 4299).

Of the twenty-five claims located and subsequently acquired by the Barber Company as aforesaid in "6-4," Kinkaid prepared the filing papers for 18 of

the entrymen, and fifteen of the deeds, conveying the property from the entrymen to Long. One deed, conveying one of the claims entered in "6-4" in September 14, 1903, was prepared by Pritchard. Four of said deeds were dated five days, two eight days, two nine days, one eleven days and one twelve days after the dates of final proof respectively. (See Appendix E.)

In the spring of 1907, Mr. Long was subpoenaed by the Government to appear before the grand jury then in session at Boise engaged in an inquiry into the transactions that are the basis of this suit.

Mr. Long, before starting for Boise in obedience to said subpoena, sent the following telegram:

"Tacoma, Wash., March 20, 1907."

"F. H. Cotton,
Eau Claire, Wis.

Say to president your company I am subpoenaed to appear before grand jury Boise Saturday next, regard matter mentioned his letter to me November 13, 03. Wire suggestions.

(pp. 3424-4567).

Geo. S. Long."

The day after said message was sent Barber telegraphed to Long as follows:

"Eau Claire, March 21, 07"

"George S. Long,
Tacoma, Wash.

Reason of request 3 years was to direct attention of other timber buyers from our at-

tempt to assemble enough timber in that section for a plant'' (pp. 4567-4568).

The persons who were in the "line up" at the land office and filed applications to enter quarter-sections in Tp. 6 N., R. 4 E., on September 14, 1903, and whose titles were procured and secured by Kinkaid for the Barber Lumber Company as aforesaid, who could be found by the United States Marshal for the District of Idaho are the following:

Rice J. Harbaugh, William R. Coleman and Alexander T. Ellis, hereinbefore mentioned. Mrs. Margaret Scully, aged 72 years, made the first entry. (p 2541).

Her daughter, Mrs. Eagleson, attended to the financial part of the transaction and negotiating the sale of the claim, and in fact all the information Mrs. Scully had about timber claims she received from Mrs. Eagleson (pp. 2528-2529-2537-2538-2539). This daughter was at that time employed in the office of the Surveyor General at Boise (p. 2579). She was anxious that her mother should get a claim in this township, so, on the Thursday morning before said township was open to entry, and before her mother had viewed the land, Mrs. Eagleson asked John Kinkaid about the sale of lands and what he thought of taking up one of said claims as a business proposition. Kinkaid replied that "his company" had been buying lands, "but he didn't want to promise, he said, that he could take them," and there would, no doubt, be a market for them (p. 2577).

Mrs. Eagleson employed one George Chapman, a constable at Boise, on Friday, before the land was open to entry, to hold the place in line for Mrs. Scully for which service she paid him \$10.00. Chapman went to the land office Saturday evening and remained at the head of the line until Monday morning, when he was relieved by Mrs. Scully (pp. 2535-2579-2580).

Mrs. Scully was located by Downs, and her filing papers were prepared at her home by a man named waters (p. 2530-2531). She concluded negotiations for the transfer of her claim with John Kinkaid (p. 2583) and conveyed title to same to George S. Long (p. 2541).

Willis A. Ross was employed about three miles from Boise by W. H. Gibbard as a ditch tender, and earned two dollars a day (pp. 2285-2286-2296). He had a wife and two children, 2 and 4 years old, respectively (p. 2305).

Ross did not know of a market for timber claims (pp. 2286-2287).

Notwithstanding the fact that Ross had never met Kinkaid, the latter, one afternoon about the middle of the week before said lands were open to entry, called Ross over the telephone and advised him that a party was going to leave Boise the next morning from the office of Mr. Davidson, a lawyer, for the purpose of locating some timber land. Ross hired a team, and he and his wife met Mr. Davidson and Mrs. Scully at Boise, and together they went to the

timber region and each were located on timber claims by Downs (pp. 2287-2288-2290-2291).

They all returned to Boise on Sunday afternoon, September 13, 1903, and before going to their home, Ross and his wife stopped at Kinkaid's office and gave him the description of the claims Downs had shown them. Kinkaid told them to get in line, at the land office. Ross took his wife home and he and Gibbard returned the same evening and formed in line at the land office, Gibbard holding a place for Mrs. Ross (p. 2293-2294). Gibbard also paid Downs the fee for locating Mr. and Mrs. Ross (p. 2300).

Kinkaid prepared filing papers for Ross and either he or someone else delivered them to Ross Sunday night after he had taken his place in the line. Ross did not pay for the preparation of these papers (pp. 2293-2294).

Though Ross had but about a hundred dollars when he filed on said claim, he did not ask Gibbard to lend him enough money for himself and wife to make final proof until within a week or two of the date for making proof.

On the day that Ross and his wife were to prove up on their claims they were at the home of Gibbard for dinner and it was on that occasion that Gibbard gave Ross about \$800 with which to make their proof (p. 2308).

Ross left all negotiations for the sale of the claims to Gibbard (p. 2298), and Gibbard, five days after the making of final proof, presented to Ross and his wife, at the office of Mr. Walker, a deed prepared by

Kinkaid, conveying title to the claims to Long, which Ross and his wife signed and acknowledged without even reading the same (pp. 2299-2300-2301). After Ross and his wife made and delivered said deed as aforesaid, Gibbard paid Ross \$300 for each claim (p. 2299).

Thus a laboring man, with a wife and two children, working for wages of \$2.00 a day, with but a hundred dollars capital, goes into a wilderness 60 or 70 miles from his home, and makes an outlay of about \$900 for two timber claims, and at that time knew of no market for the same (pp. 2286-2287).

Ross admits that he made statements to the District Attorney and his assistant, contrary to those he gives as evidence in this cause. He says that part of his statements made to the District Attorney were untrue, and he attempts to reconcile his conduct on that occasion by saying that when he made the statement to the District Attorney he was not under oath (p. 2326).

Mrs. Josie M. Ross, the wife of Willis A. Ross (p. 2328) made her final proof with the money Gibbard gave her husband for that purpose on the afternoon of the day she proved up (p. 2333).

On final proof, in response to question No. 17, "Where did you get the money with which to pay for this land, and how long have you had the same in your actual possession?" Mrs. Ross said: "I earned it working for a ditching camp on the Settlers Canal. Have had money almost four years." (Plaintiff's Exhibit No. 126 F) (p. 5163).

William B. Davidson is a lawyer, having practiced that profession for nine years (p. 2146). On the afternoon of the Thursday before the Monday on which said township was open for entry, John Kinkaid called at the office of Mr. Davidson and talked with him about taking up this particular claim. Kinkaid told Davidson "that a party was being made up to go up and look at some timber, and that they had three, and that if he would make the fourth, he would like to have him go along." Mr. Willis Ross and his wife, and Mrs. Margaret Scully were the three with whom he went (pp. 2147-2148).

Davidson presumed that the land was open to entry, or Kinkaid would not have sent him out (pp. 2148-2149).

Davidson was located by Downs and he did not know of a market for timber claims when he applied to enter (p. 2148).

Davidson made the final negotiations for the transfer of his claim with Kinkaid, and conveyed title to the same to Long about three weeks after he made proof (p. 2147-2154-2155).

George G. Eagleson, who is 70 years of age, (p. 2354), with his wife, Mary J. Eagleson, lived at Jefferson, Iowa (p. 2342). In the latter part of August, 1903, they left their home to make an excursion to Boise, Portland and the Coast, and before starting, purchased a round trip railroad ticket. On their way to the Coast they stopped at Boise for a few days, but did not discuss with anyone the subject of taking up a timber claim (p. 2358). They then proceeded to

the Coast, and on their return journey, arrived at Boise about four o'clock on Thursday afternoon before the Monday on which the land in this township was open to entry. The next morning (pp. 2343-2345) at daylight, they started for the timber country, and were located by Downs on their claims that evening (pp. 2344). They do not know who held their places in line for them, nor did they pay anyone for that service (pp. 2348-2346), neither do they remember who prepared their filing papers or from whom they received them (p. 2348). In September, 1903, and within two weeks after filing on said claims, Mr. and Mrs. Eagleson returned to their home in Iowa and remained there until the time set for making the final proof, which was December 11, 1903 (p. 2364). Though at the date of making final proof neither Mr. or Mrs. Eagleson knew John Kinkaid (p. 2350), within five days thereafter, to-wit: December 16, 1903, they sold both claims to Kinkaid in consideration of \$750 apiece (p. 2351), and signed and executed deeds in Kinkaid's office, prepared by Kinkaid, conveying the said claims to Long (pp. 2352-2353). They again returned to their home in Iowa, arriving there before Christmas, 1903 (pp. 2364-2365-2366).

Joseph Penrod was located on a claim in said township by Downs on the Saturday before said township was open to entry (pp. 2431-2432). The first person who spoke to Penrod was H. L. Fisher, a brother-in-law of Thomas L. Martin, who will be mentioned hereafter (pp. 2430 and 2437). Fisher told Penrod

over the telephone that there was a crowd going out from Boise to take up claims, and that the chances were good for him to get one (p. 2431). Penrod joined the line at the land office Sunday evening and remained in line until said office opened Monday morning (p. 2433).

At the date of his application to enter a claim, Penrod did not know of a market for timber claims (p. 2436). Mr. Penrod had his filing papers prepared Sunday evening by Frank Martin, on the suggestion of the said Thomas L. Martin, the nephew of the said Frank Martin, the same Frank Martin hereinafter mentioned in connection with the Anderson entries (pp. 2432-2433-2434). Penrod negotiated for the transfer of his claim with Fisher, and conveyed the same to Long (pp. 2436-2437-2438).

Wilbert R. Reeves was located on a claim in said township on the Friday before the Monday on which he made application to purchase a claim at the land office (pp. 2442-2443). He was notified of the date he was to view the claim by H. L. Fisher, who communicated this intelligence to him through Penrod (p. 2443). Though Reeves had not been to Kinkaid's office, nor employed him to prepare his papers, nor given Kinkaid a description of the land he proposed to file on, Kinkaid did prepare these application papers, and the same were delivered to Reeves while in line at the land office Sunday night (pp. 2447-2448).

Subsequently Kinkaid told Reeves if he, Reeves, was ready to sell his claim, he, Kinkaid, was ready to buy the same (p. 2450). Reeves negotiated with Kinkaid for the transfer of title to his claim to Long. Kinkaid had the deed prepared before Reeves went to his office (pp. 2451-2452-2453).

John K. Woodburn went to view the land with Mr. Henry Noble, Mr. Loren Kinert and Mr. Charles Faraday. He was located upon the claim by Patrick Downs (p. 2114). Woodburn, who was a partner of John Kinkaid, paid Downs the location fee and charged the same to the partnership account (p. 2115).

Before Woodburn went to the timber region, to look at the claim, Kinkaid had told him, Woodburn, he thought it would pay him to take up a claim (p. 2115). Woodburn learned that the person through whom he could sell his claim and sell it quickly was Kinkaid (p. 2122), and he did sell through him within two weeks after he made proof (p. 2124). He made two deeds conveying this property to Long. The first deed is without date and is acknowledged before L. M. Pritchard on a blank date (Plf's Exhibit No. 118 N) (pp. 5138-2125). The second deed was made at the request of Governor Steunenberg, and is in the hand writing of Mr. Pritchard, and is dated and acknowledged before Pritchard October 24, 1904 (Plf's Exhibit No. 118 M) (p. 5137).

At the date of the sale of said property by Woodburn to Long through Kinkaid, Woodburn was in-

debted to Kinkaid in a certain sum of money, and instead of Kinkaid paying Woodburn the purchase price, he credited Woodburn's account to that amount, and then Woodburn was indebted to Kinkaid in the sum of \$19.00 (pp. 2123-2124).

Thomas L. Martin is the nephew and law partner of Frank Martin hereinbefore referred to in connection with the Anderson entries. He is the husband of Bertha Martin, the brother-in-law of Anna Fisher and H. L. Fisher (pp. 1767-1768-2089-2437-2482). He is the son of Thomas B. Martin and Mary J. Martin, and the brother of Nettie J. Weston, all of whom are hereinbefore mentioned in connection with the Anderson entries.

He is the same Thomas L. Martin who induced Edward J. Phelps, husband of Eleanor A. Phelps, also connected with the Anderson entry, to obtain the relinquishment of the homestead claim of Henry A. Snow, and later negotiated the sale of Phelps' claim to the Barber Lumber Company (pp. 977-979-983).

He is the same person who paid the fees to Downs (p. 1769) for locating Bertha Martin upon a timber claim in the Boise Basin, which previously had been entered by Ida M. Briggs at the instance of John I. Wells, and relinquished by her after receiving from Wells \$400 with which to make final proof (p. 3306, and page 16 of Book marked "T. & S. Original Filing of Sworn Statements"). He also furnished Bertha Martin the money to make final proof (p. 1773), and

then transferred said claim to the Barber Lumber Company (pp. 1776-1777).

During the period the State was considering which lands it would select in Tp. 6 N., R. 4 E., in the exercise of its preference right, Thomas L. Martin knew that Downs and Kinkaid were locating persons on quarter sections of timber land in that township (p. 2490). He asked Downs if he would locate him, Martin, on a timber claim. Downs directed him to see Kinkaid, and Martin thereupon saw Kinkaid, who advised him of the terms upon which "they" would locate him, Martin (p. 2490).

Mr. Martin, with Mrs. Anna Fisher, his sister-in-law, went to view the timber claims on the Saturday before the Monday on which they made their applications to file at the land office. They met Downs and after viewing the timber land, returned to Boise on Sunday (p. 2484). Martin employed a son of George Chapman to hold a place in line for Mrs. Fisher and Martin himself joined the line and remained at the land office until Monday morning (p. 2486-2487).

Martin sold his claim through Kinkaid and conveyed it to Long within twenty-two days after he made proof (p. 2494).

Although Martin prepared the deed himself, he did not know who the grantee in the deed was (p. 2493-2494). It was not an important transaction to him.

Wheeler H. Martin, at the date of entering a claim in said town, was married and had one child. He was employed as a bartender and received for his services \$40 a month, and his board (pp. 2252-2267).

Martin resided about five miles from where the timber claims were located, and several days before he was located his father, William H. Martin, telephoned him that a party was going out from Boise to locate on timber claims, and for him to meet them at the "Star Ranch," and also to notify his, Wheeler Martin's, brother, Frank R., who was working in a mine about 60 miles away (pp. 2254-2255-1883). Martin was two days going after and returning with his brother, and they were both located by Downs (p. 2256).

Martin was given a description of the claim by Downs, who directed him to take it to Kinkaid (p. 2257). Kinkaid prepared his filing papers, and he, Martin, entered the line at the land office Sunday night, Tom Martin having told him to get into line (p. 2558).

At the time Martin filed his application in the land office, he did not have the money with which to purchase the claim. On the day he made final proof, he obtained from a bank at Boise \$412, on a note endorsed by his father, and with that money he made his proof. (p. 2259-2260).

Martin, however, when he made his final proof at the land office, in answer to the question "where did you get the money with which to pay for this land, and how long have you had the same in your actual possession?" answered: "From my earnings, and have had money about two years" (Exhibit 124 F) (p. 5149).

On December 19, 1903, Martin, upon the advice

of Kinkaid, made and filed in the land office an affidavit to the effect that he did not understand the questions asked him in his examination on final proof (pp. 2270-2271, and Exhibit 124 N) (p. 5151).

Martin sold his claim to Kinkaid, (p. 2263) and made a deed conveying title to the same to Long (p. 2265).

This deed, however, is the second deed for the land which Martin executed at the instance of Kinkaid, the first having been destroyed by Kinkaid upon the delivery of the second several months after the first deed had been executed (p. 2263-2264).

Cleora M. Wickersham, whose maiden name was Martin, then wife of one Snow, is a sister of Frank R. Martin, and Wheeler H. Martin (pp. 2456-2457).

Kinkaid prepared her filing papers (pp. 2461-2462). Mr. Lindsay held a place in line for her Sunday night (p. 2460). Mrs. Wickersham, at the date of making final proof, was ill, and had to be carried to the land office (p. 2463).

She negotiated for the transfer of her claim with Kinkaid (pp. 2464-2465), and conveyed the title to the same to Long, by deed prepared by Kinkaid, within three weeks after she made final proof (Exhibit 133 O) (p. 5178) (See stipulation hand writing, etc.).

Frank R. Martin is a brother of Mrs. Wickersham and Wheeler H. Martin (pp. 2468-2469).

At the date he filed upon a claim in said township, he was twenty-two years of age, and was employed

as a laborer in a mine about 60 miles beyond the timber region. His wages were two dollars and a half a day and his board (pp. 2476).

During the week prior to opening of said township to the public for entry, Wheeler H. Martin visited his brother at the mine and induced him to enter a claim. They started for the timber country together, and were two days enroute. Frank R. Martin was located by Downs, and his filing papers were prepared by Kinkaid (pp. 2469-2470-2471).

He reached Boise Saturday evening, and joined the line at the land office Sunday, and remained there until Monday, when he filed his application (pp. 2470-2473).

He paid \$412 into the land office the day he made proof, some of which he had had in his pockets for three or four years (p. 2475). He had had about \$100 of that amount in his pocket for three or four years (p. 2476). Kinkaid purchased his claim (p. 2477), and he conveyed title to same to Long, within eight days after he made proof. Kinkaid prepared the deed. (See stipulation; also 2480).

Charles B. Faraday was located on a claim by Pat Downs (p. 2236). He went to the land office Sunday night and employed a negro to hold a place for him in line until Monday morning (p. 2241).

His filing papers were prepared by John Kinkaid (in stipulation), but Faraday does not remember this fact, or where and when he received said papers. (p. 2242).

He negotiated for the transfer of said claim with

Kinkaid at a date more than a week after he made final proof (pp. 2246-2247), and conveyed his claim to Long, February 13, 1904 (p. 2249). The deed is in the hand writing of Kinkaid and Faraday does not know whether or not he ever made another deed of said property prior to the one above mentioned (pp. 2248-2249).

Harry B. Noble, at the time he entered a timber claim in said township was twenty-one years of age, and a student at Moscow, Idaho, but in September, 1903, was at Boise on a vacation (pp. 3429-3430). Noble did not know of a market for timber claims (pp. 3438-3439).

He remembers very little about the transaction, other than that he was located by Downs (p. 3431). He had known Kinkaid intimately for a number of years (p. 3431).

Noble remembers that he stood in line at the land office a part of one night (p. 3438). Kinkaid prepared his papers for application before he went to view the land (p. 3435, and see stipulation). Noble got the money with which he made proof from his mother. He had no bank account at that time, nor had he ever had one. On final proof, however, he swore that he had kept an account for six months at the Capital State Bank at Boise (p. 3440). The bank records show that he never had an account with that institution.

Noble conveyed title to his claim to Long February 4, 1904, by deed prepared by Kinkaid (p. 3443. See stipulation).

Noble's brother, whose whereabouts he does not know, negotiated for the sale of said claim and his mother received the proceeds of the sale (pp. 3442-3443).

Lorin T. Kinert, at the date he filed on a claim in this town, was clerking in a grocery store at Boise, and received a salary of from \$35 to \$45 per month (p. 2159-2160). He was simply told that a party was going to look at the land, and he went along with it (p. 2164). Kinkaid prepared his filing papers before he, Kinert, went to view the land (pp. 2163-2164), and Downs located him on a claim (p. 2165). Kinert had been located by Downs and had returned to Boise several days before the claims were open to entry (p. 2162). Kinert borrowed the four hundred dollars with which he made proof (p. 2168). He negotiated for the transfer of his timber claim with Kinkaid for \$800, executed a deed, prepared by Kinkaid, conveying title to the claim to Long, and upon the presentation of the deed, signed and acknowledged, at the First National Bank at Boise, was paid \$800 in gold (pp. 2169-2170-2171).

Counsel for the defense produced a check payable to the order of Kinert in the sum of \$800, and asked him if that was the check Kinkaid gave him for his land. Kinert admitted that his signature was on the check, and that he judged that the bank had instructions to cash the check when the deed which Kinkaid had made out, duly executed and acknowledged, was presented to it (pp. 2172-2173). This

check was not introduced in evidence, and counsel who write this brief are not advised of the date of said check. However, it is the only check of Kinkaid that has been produced, and Kinkaid's testimony is to the effect that all of his checks were either lost or destroyed or stolen (pp. 4329-4330-4331).

Joseph Ehrmanntraut, Jr., and his wife, Margaret M. Ehrmanntraut, also entered claims in said township September 15, 1903. Mrs. Ehrmanntraut remembers but little of the transaction other than that she was located by Downs, and that she paid an "old German" \$5.00 to keep a place in line for her (p. 3887); that Kinkaid prepared the deed conveying her claim to Long, and that she signed the same in Kinkaid's office (pp. 3888-3889, and stipulation), and that her husband furnished her with the money to purchase the property and for incidental expenses attached thereto (pp. 3888-3889).

Mr. Ehrmanntraut was approached by Edward Brisben and Henry Ries with a view of inducing him to take up a timber claim (p. 3894).

It will be remembered that Brisben was conscious of wrong doing in connection with his entry of a Boise Basin claim, and that Ries was very active with Wells, West and others, in securing entrymen for the claims in the same tract.

Mr. Ehrmanntraut was induced by Clifton Blevin, a nephew of his, who had located a claim on Crooked River, to meet Downs, whom they all recognized as the man through whom the claims must be entered (pp. 3895-3894-3896-3897).

On August 27, 1903, while Ehrmanntraut was in the northern part of the State of Idaho, on a camping excursion, he received a letter from Brisben, urging him to return to Boise and stating that Henry Ries had told him, Brisben, that he, Ehrmanntraut, must come home, "that they was going to file on some claims."

Two days after the receipt of this letter, Ehrmanntraut started for Boise and upon reaching said city he called upon Ries and the same evening visited Downs, who, at that time, was living at the home of Brisben (pp. 3895-3896).

On August 31, 1903, Downs told Ehrmanntraut he was going over in the Basin to get ready for the twelfth of September (p. 3897).

Ehrmanntraut paid Downs fifty dollars for locating him self and wife upon claims (pp. 3901-3902).

Ehrmanntraut stood in line at the land office Sunday night, September 13, 1903, and he is not sure whether Clifton Blevins held the place that night for Mrs. Ehrmanntraut (p. 3898).

The application papers of Ehrmanntraut and his wife were made out by Kinkaid (Stipulation).

Ehrmanntraut sold both claims to Kinkaid (p. 3904), and he, Ehrmanntraut, and his wife conveyed titles to the same to Long by deeds prepared by Kinkaid (Stipulation).

All of the deeds made by said entrymen, conveying title to the lands in this township to Long, with but one exception, were not recorded until July and

September, 1904. (See schedule relative to "6-4" entries).

It was not until April 10, 1905, that Long made and executed a deed to the Barber Lumber Company, conveying to said company title to the lands in said township hereinbefore mentioned (p. 3361).

Much effort was exerted by Governor Steunenberg, Mr. Barber and others on behalf of the Barber Lumber Company to induce Governor Morrison to sell to that company the State land in the Boise Basin (pp. 1106-1108-1124).

THE INTENTION TO USE SCRIP IN 6-4.

Notwithstanding the multiplied asserverations of Barber and Moon and other witnesses who testified in behalf of the defense, that it was their intention to scrip Tp. 6 N., R. 4 E., from the conversations and correspondence between Barber and Moon and the acknowledged agents and representatives of them and the Barber Lumber Company, it is clear that it was not intended or proposed to acquire title to that township in any other manner or by other methods or means than by procurement; and the correspondence had and statements made in relation to scrip had to do only with isolated or scattered forty-acre tracts.

Barber and Moon, in the spring of 1902, being deeply impressed with the necessity of possessing said township and operating the same in connection with other proposed purchases of timber land in that neighborhood, caused Thornton and Connors to

cruise and estimate the timber growing on said lands. From some source Barber and Moon understood that the township was to be open for entry July 15, 1903, and on the 2nd of July, Mr. Barber warned Steunenberg not to neglect said township on the 15th. It is urged by the defense that John J. Blake was employed by Governor Steunenberg to locate scrip in this township. Mr. Blake is a lawyer and at that time and for a number of years prior thereto, had offices with William E. Borah, who was then the attorney for the Barber Lumber Company, and was paid an annual salary for that service. Mr. Blake succeeded Mr. Borah as the attorney for said company and continued in that employment at an annual retainer until January last. (pp. 4041-4042).

Mr. Blake, as a witness for the defense, testified that they abandoned the idea of locating scrip in said town two or three days before the land was open to entry (p. 4039), because they concluded it would be impossible for them to make a selection successfully, as some entrymen would select the land that they were to apply for (p. 4039), and further that he was not sure that they, Steunenberg and Blake, knew what lands the State would select (p. 4044).

He also admits that he thought of mailing application to locate scrip to the land office, and thus precede the entrymen, and also that it was suggested that they employ someone to stand in line Friday and Saturday and Sunday to the same end.

Considering the energy and effort exerted by Mr.

Borah in an endeavor to learn what lands the State would select, and the little exertion it cost Kinkaid to possess himself of such information, and the small fee he received from Downs for that intelligence, there being no evidence to the contrary, it must be concluded that Governor Steunenberg and the other agents of the Barber Lumber Company did know what lands the State would select, and especially considering the relations that had existed for over a year between Steunenberg, Palmer, Barber, Moon and Downs and Kinkaid.

Still having in mind the fact that Mrs. Scully employed Chapman to retain a place for her at the head of the line for \$10; and that Mrs. Ehrmann-traut had a place reserved in the line for her by an old German for \$5.00, and that others who filed applications paid nothing for having their places held in line for them; and the further fact, that the financial condition of about every one who made filings in the land office on claims in said town September 14, 1903, was such that they had to borrow the money with which to make final proof, the proof is irresistible that had the Barber Company intended or desired to file scrip on any of the land in said township, it could very easily have done so.

Added to this is the fact that though the Barber Lumber Company had had several thousand acres of scrip since August 15, 1902, it did not locate any scrip either in this township or any other timber land until 1904 (p. 4785).

Steunenberg and Borah acquired for the Barber

Lumber Company, through Kinkaid, every one of the 25 tracts of land entered in said township on September 14, 1903, for about \$800 a claim.

Assuming for the purpose of this statement that the Barber Lumber Company intended to scrip as much of said township as contained a sufficient amount of timber to warrant it in acquiring title to the same, and that it was frustrated in this plan or design because its agents were unable to learn of the State's selection until too late to prepare and present its, the Barber Lumber Company's, application to locate scrip, or that Moon had neglected to execute and forward a power of attorney authorizing said agents to use the scrip which had been purchased in his name, in time to record the same before the township became open to entry, or that it was unable to secure a person who would go to the land office before other prospective applicants arrived, and remain there until the land office opened Monday morning, the fact remains that after the line up at the land office September 14, 1903, and when the reasons heretofore assigned by the agents of the Barber Lumber Company for not scripping were no longer present, there still remained open for entry a large quantity of valuable timber land in said township, and no reason has been given for not locating scrip on the remaining quarter-sections, than that given by Downs to Snow prior to September 10, 1903, "that after the company got 6-4, what they could get out of six four, they wasn't going to take any more

land, that they had about all the land they wanted" (p. 3922-3930).

On the day after the line-up at the land office, to-wit: September 15, 1903, three persons entered claims in said township, a week later, September 21, 1903, four persons entered claims in this township, viz:

Henry F. Cassidy,
Ella L. Martin,
Frank Martin,
C. Jane Martin.

And, again, nine months later, June 8, 1904, Abbie M. Briggs and Beulah B. Lake made applications to enter claims in said town.

In June, July and November, 1904, fourteen other persons made entries in said town, among whom were James P. Howe, James C. Sullivan, and Charles H. McCrum, who entered claims July 18, 1904.

Thus, within fifteen months after the line-up at the land office, September 14, 1903, 3,680 acres of land were entered by twenty-three persons in said town, and the Barber Company, though it still held its scrip did not locate even one acre of it thereon. (See Appendix E.).

It might be urged as reason that the Barber Lumber Company did not scrip any land in this township, that the timber standing thereon, was inferior in quality and small in quantity, and though the evidence fails to show whether or not said company acquired titles to all of the claims entered, subsequent to September 14, 1903, the record does show that said

company did purchase seven of said claims on the dates and at prices which follow:

Beulah B. Lake, \$800, September, 30, 1904,
(Stipulation and Barber
Lumber Company Ledger
Exhibit 143 Q) (pp. 5226-
5367).

Abbie M. Briggs, \$800, September 23, 1904,
(Stipulation and Barber
Lumber Company Ledger
Exhibit 143 Q) (pp. 5226-
5344).

Ella L. Martin, } \$2,850, December 7, 1904,
 } (p. 5226 and Exhibit 143
Frank Martin, } Q).

Charles H. McCrum, } \$1,800, November 4, 1905.
 } (Exhibit 143 Q) (p. 5230).

J. P. Howe, \$900, May 26, 1906, (Exhib-
it 143 Q) (p. 5231).

Thus seven claims, at least, in said township were of sufficient value to warrant said company in purchasing the same. Five of them at a cost of \$100 over what it paid the entrymen for the claims entered September 14, 1903, and for two of said claims, the claims of the said Frank Martin and wife, it paid for each almost twice as much as was paid the entrymen in the line September 14, 1903. The argument that they intended to scrip ceases to be persuasive, in view of the fact that they had ample scrip and had an opportunity for fifteen months to locate it on land so desirable and valuable that they subsequently purchased the same at an advanced price instead of scripping it.

That it was intended to scrip in forty and sixty acre tracts only, is conclusively shown by the evidence and undisputed facts.

Early in 1902, before any scrip had been purchased, and the agents of the Barber Company were casting around with a view of purchasing scrip, Mr. Barber was much disturbed over the fact that the scrip that they had in mind could not be located on single forties, etc. Therefore Barber writes Palmer:

May 21, 1902, "We are now negotiating for three thousand acres of block scrips available in that section of the country, and would like to know if you can use this at once, as we understand it must be located in one transaction" (p. 4399).

May 30, 1902, "I have your telegram and note that scrip must be in small denominations, forty to eighty acres, and think this increases difficulty in securing it * * *. We have several large bunches, 5000 to 20,000 acres offered to us, but we understand these parcels have to be used in one entry, on one tract each" (p. 4404).

May 31, 1903, "In the matter of using forest reserve scrip in locating Government lands, we are informed that the scrip in question may be placed on **single forties in different sections and townships**" (p. 4405).

On July 26, 1902, Steunenberg writes Barber: "Mr. Palmer was here yesterday, returned to Spokane to-day. He left me a list of estimates on what he called scrip forties. There were 119 of these forties. * * * I have not felt like laying any scrip until en-

tries were out of the way" (p. 4493).

On August 15, 1902, the date that the Barber Lumber Company's ledger shows that the first scrip was bought, the same book shows a payment on the same day of \$250 to Downs for estimating "Scrip 40's" (Exhibit 143 Q) (pp. 5221-4671).

The ledger of said company also shows a payment September 30, 1905, to W. D. Fields,

Scrip for 40 acres in T. 6 N., R. 4 E., and
40 acres in T. 5 N., R. 7 E. (p. 5229).

Hoseley also "estimated a few 40's" in 6-4 (p. 2757).

Downs selected scattered 40's in 6-4 and posted notices for Governor Steunenberg of the Barber Lumber Company p. 4015). Sometime in the summer of 1903, prior to September 10th, Downs told Snow that he was cruising and estimating isolated 40's, and he was being paid \$5.00 for each 40 he estimated, etc. (pp. 3934-3935-3936).

The argument advanced by Hoseley, why he might have been mistaken in quoting the statement made by Barber when the latter gave him the book hereinafore referred to, is refuted by the facts. In other words, it is clear that, at that time, Barber was assured that the title to the several quarter sections indicated by a red mark on the 6-4 plat in said book would be procured from the prospective entrymen, to the degree that he could confidently speak of said lands as "the holdings of the Barber Lumber Company."

As to the testimony of Hoseley to the effect that

certain tracts indicated in said book by a red mark were subsequently located by scrip and that no one knew what land would be selected, he is mistaken, for although the scrip had not at that time been located, Mr. Barber had determined, prior to September 4, 1903, the land upon which the scrip was to be located and had prepared a list of the same.

On September 4, 1903, Barber telegraphed Steunenberg:

“Arrange to have Downs and a competent surveyor where you can get them at a day’s notice. See letter.”

On the same day Barber writes Steunenberg:

“In accordance with letter and telegram of this date, the bearer is sent out for the purpose of locating some unsurveyed land and you will arrange to have him taken upon the land along the north fork of the Boise river, east of Range 8” (pp. 4574-4575).

These letters and telegrams were attached to the list of selections Barber had decided upon (pp. 3951-3952-3953-3954-3957-3958).

If it is to be found that the defendants intended to use scrip in 6-4, the Court must first find inexcusable laches on the part of Barber and Moon, who were efficient business men, of Steunenberg, a man of commanding ability and great diligence, and their attorneys, Messrs. Borah and Blake, neither of whom was ever accused of incompetency or professional dereliction. Barber believed that the township was to be opened on July 15th, and on the 2nd of that month

telegraphed to stimulate Steunenberg to diligence in expectation of the supposed date of action. The court is now asked to find that these energetic and astute captains of industry, and their professional advisers suffered the ten or eleven weeks between July 2nd and September 14th to glide by without any preparation whatever for action intended to be taken at the middle of July. The court is asked to believe that, in all this time, no one thought of looking at the documents and discovering that a power of attorney was needed to locate the scrip.

Again, if the defendants' version of the 6-4 affair is to be accepted, the court must believe that Downs, who had served the company faithfully for two years before, and who was afterwards entrusted by the company with responsible service, became, suddenly and unaccountably, for the time being, unfaithful to the company's interest, and antagonistic to the company's known endeavors. It must be found as a fact that Kinkaid, with like abruptness and equal want of reason, developed similar treachery, although he also had, for two years acted for the company in confidential employment, had secured substantially all the lands which the company had acquired, and was for some time after that in the employ of the Barber Company. See ledger account .p. 5224) "June 30, '04, John Kinkaid services" \$200.

Finally, if the Court finds that the company persisted in the alleged purpose to use scrip, the testimony of Mr. Blake, the company's attorney, and one of its witnesses, must be ignored. Mr. Blake states

that he had considered the project of locating scrip, and had definitely abandoned it some days before the opening of the township.

If what Kinkaid states is true, as to the manner in which he procured a copy of the intended State selection, it must have been a simple thing for an attorney of Mr. Borah's standing to obtain another copy; and it is not suggested that the Barber Company's agents were embarrassed by any secrecy as to what the State intended to do. Mr. Blake's testimony as to his consideration of the subject presupposes on his part a knowledge, or the ability to acquire knowledge, of the proposed selections. It was possible, as Mr. Blake says he knew, to send the scrip applications by mail, and so insure priority of the location over all, except possibly one or two, of the applicants in line. It was possible to employ a man to hold a place in line for \$10, which Mrs. Scully paid, or perhaps for \$5.00, which Mrs. Ehrmanntraut paid, considering the financial condition of most of the applicants in line, and the extent of possible profit, the place of almost any of them could have been bought for \$300 or \$400.

If the Court is to find that there was any real purpose to acquire the lands in 6-4 by the location of scrip, the Court must believe that all the energies of this aggressive group of men were suddenly and inexplicably paralyzed, that their most trusted agents all at once turned traitors, and that their able counsel lost for the moment all their professional skill.

If the Court can believe that all these accidents

concurred at one critical junction, then it may be found that the defendants omitted to use scrip in 6-4 because their intention in that regard was thus miraculously defeated.

The explanation given for the use of Long's name as grantee in the deeds by which titles were taken for the lands in 6-4, however plausible in itself, is seriously clouded by the fact that Long through his connections with the Weyerhaeuser Timber Company was much better known to those dealing in timber lands, and especially in Idaho and Washington, than Barber and Moon of Wisconsin, at that time could possibly have been, and by Long's telegram of March 20, 1907, sent when he started for Boise to appear before the grand jury (p. 4567); **supra**. According to the testimony, the reason for naming Long as grantee had been fully explained to him in Barber's letter of November 13, 1903, in which the whole situation was characterized by reference to a similar condition in which Long's company had found occasion to apply to Barber for a similar accommodation (p. 4565 **supra**). That being the case, and Mr. Long being fully apprised of the reasons bearing upon the case, it does not appear why he should have felt obliged to appeal to Mr. Barber for "suggestions" while he was on his way to meet the grand jury.

If the accommodations accorded by Mr. Barber to the Weyerhaeuser Company was simply the use of his name to disguise Weyerhaeuser purchases it was equally simple for Mr. Long to say so to the grand jury. In that case it was unnecessary to re-

quest Mr. Barber's book-keeper to say to Mr. Barber that Mr. Long was going before the grand jury and needed instruction as to what he should say. If the former exigencies of the Weyerhaeuser Company had involved something more reprehensible than mere concealment of its titles, then the Barber letter of 1903 proved that the present exigencies of the Barber Company, grew out of something similarly improper. If the Weyerhaeuser's need of Barber's name, and the Barber's need of Long's name, were identical and equally innocent, then there was no reason why Barber should inform Long what the latter should disclose to the grand jury. In either case the Long telegram of 1907 is not accounted for, and, if the reason for making the deeds run to Long was to conceal the interest of so large a concern as the Barber Company, no greater solocism could have been committed than to put the titles in the name of a man identified with a lumber concern which stood to the lumber trade in the same relation that the Standard Oil sustains to the oil business.

THE INTENTION TO USE SCRIP.

One of the elements of the defense which is intrinsically incredible, and is also inconsistent with itself and with established fact, is that portion of the defendants' testimony which relates to their intention to acquire titles by the use of scrip.

The assertion of such intention is made by the defendants with particular insistence, and is of especial materiality, because the alleged purpose to rely upon

the location of scrip is put forward for the sake of clearing the defendants of responsibility for the entries, and to enable them to escape the proof of guilty procurement on their part.

In numerous passages of Barber's and Moon's testimony, indeed at every point where the matter can be suggested, it is declared that the purpose was to use scrip; and the transcript is replete with conversations and correspondence relative to the purchase and location of scrip.

Further than the mention hereinbefore made of scrip it need but be added that the contract of March 12, 1902, clearly contemplates that some, at least, of the lands intended to be acquired shall be obtained through entries to be made by individuals. In the third clause, Steunenberg guarantees the title to all land to be bought by him "where such title is or may be derived or obtained from any person or source other than that acquired by or through the location of Government scrip" (p. 4391). In the seventh clause, Barber and Moon engage to advance the necessary funds to purchase scrip, and also to "advance the necessary funds to acquire title to certain of said lands from other persons than the United States" (p. 4393).

Barber and Moon also agree that "they will, from time to time, as and when required, advance the necessary funds to purchase Government scrip with which to obtain title to said lands" (p. 4392). But there is no stipulation that any part of the lands are to be acquired by scrip. The purchase of scrip is to

be made "as and when required;" but nothing is said as to what conditions or circumstances shall require the use of scrip. (pp. 4496-4786).

Moon testified that it was their understanding with Steunenberg that they were to furnish him the scrip for the Basin and Crooked River regions, and Barber, writing Steunenberg, stated that Carson and Palmer had the matter of using scrip in hand (pp. 4496, 4786), but the terms of the contract were literally fulfilled without using a single acre of scrip.

Steunenberg in writing Barber, July 26, 1902, says:

"He (Palmer) left me a list of estimates on what we call scrip forties * * * There were 119 of these forties * * * I have not felt like laying any scrip until the entries are out of the way. * * * Don't buy any scrip unless you can buy it right. I expect, however, to get it within a few weeks or just as soon as the remaining of the titles of entrymen are taken" (pp. 4493, 4494).

Barber writing Palmer, May 20, 1902, said:

"I have your telegram, and note that scrip must be in small denominations, 40 to 80 acres, and think this **increases the difficulty in securing it.** * * * We understand these parcels have to be used in one entry on one tract each" (p. 4404).

On the same day Barber again writes Palmer that they are informed that in using forest reserve scrip it may be placed on single forties in different sections and townships (pp. 4404, 4405).

No scrip was laid on surveyed lands prior to 1904 (p. 4785), and no applications for the location of scrip on surveyed lands were made until April 14th and October 1st, 1904, respectively (pp. 4632, 4637), or for location on unsurveyed lands until November 12, 1903.

It will be observed that the land thus applied for was located in 40 and 80 acre tracts widely scattered over numerous sections and townships (pp. 4631, 4634, 4636, 4637, 4638, and appendix F).

The evidence on this point is made by the defendants themselves of capital importance; and, if it is found inadequate, not only is the defense impaired in its most substantial element, but the credibility of the defense as a whole is destroyed.

That the defendants intended to use some scrip, and to use scrip where it was more advantageous than procurement, may be admitted. But the proposition, that they intended to use scrip exclusively, and in preference to entries when entries should be cheaper or more convenient, is not only inconsistent with the fact that five-sixths of the acreage was obtained by procurement, but is not borne out by the evidence given on the part of the defendants themselves.

No scrip was bought until August 15, 1902. This purchase was of 6,000 acres; and Mr. Moon says, "**we had a time getting rid of that**" (p. 4785). No more surveyed-land scrip was bought until **1904 or later** (p. 4785). The 6,000 acres was broken up and located **in small parcels** (p. 4784). In all, less than 12,000 acres was bought, of which 2,000 acres was for use on

unsurveyed land, and the total area acquired was between 65,000 and 70,000 acres.

Why the defendants chose to procure entries rather than to buy scrip, it is immaterial to inquire. If all that they say for the sake of demonstrating that it was to their own interest to use scrip could be accepted, and if it appeared that the employment of entrymen was a purely gratuitous violation of the law, that fact would be far from conclusive. The same consideration would equally apply to the nearly contemporaneous cases of Williamson, in Oregon, and of the Detroit Lumber Company, in Arkansas, in both of which it was found that fraudulent procurement had been resorted to.

In this case it appears from the defendants' own correspondence, by them put in evidence, that scrip was more expensive than entries at the usual price of entries, and that there were practical difficulties in the procurement and location of scrip which made the employment of entrymen preferable to the use of scrip.

Although Mr. Barber testifies that, in 1902, scrip was selling at from \$4.50 to \$5.50 per acre (p. 4376), Palmer, writing on April 5, 1902, that Steunenberg intended to scrip the residue of the desired acreage, comments: "**This plan may cost more but it is safer**" (p. 4429).

On the same day Palmer was offered 3,000 acres of scrip at \$6.00, and his "impression was, it could be bought for \$5.50" (p. 4446).

On May 13, 1902, Palmer cannot learn of any scrip

under \$5.50," and that in small quantities" (p. 4446).

On June 25, 1902, Palmer reports buying 5,000 acres at \$5.50, and that he can buy 5,000 more at the same price (p. 4447).

What became of this purchase of 5,000 acres does not appear. It seems not to have been accepted by Barber and Moon, no item of that character appearing in their accounts; and it was certainly not located.

The additional 5,000 acres offered to Palmer at the same price was not bought, then or thereafter. At that time Steunenberg had acquired, counting as his all the lands covered by all the subsisting applications theretofore made, less than 18,500 acres in the Basin, and probably less than 18,000 acres, and he was more than 6,500 acres short under the contract of March 12, 1902.

If it was intended to complete the Basin acreage with scrip, this was the time to buy. Instead of accepting the opportunity thus presented in June, Barber and Moon let more than six weeks elapse before purchasing; and, when, in August, they bought 6,000 acres of scrip, the Basin entries had been practically completed.

On July 26, 1902, Steunenberg gives the reason for delaying to buy scrip, saying, "I have not felt like laying any scrip until the entries were out of the way" (p. 4493). At that time Palmer, Carson or Moon had not purchased or furnished any scrip.

On August 19th he reports the making of titles through entrymen (p. 4783).

From the foregoing facts it may be inferred: (1)

that the cost of scrip was greater than the cost of entries; (2) that there was no intention to use scrip in the Basin; and, (3) that Barber and Moon knew that titles were being procured by entries.

A remarkable circumstance is that, if the correspondence offered by the defendants can be trusted, great quantities of scrip were offered to Barber and Moon in the two months immediately succeeding their contract with Steunenberg, and most of it at lower rates than they afterwards actually paid.

On April 5, 1902, Palmer was offered 3,000 acres at \$6.00, which he thought could be had for \$5.50 (p. 4446; *supra*).

On June 20, 1902, five days before Palmer bought 5,000 acres at \$5.50 Barber telegraphed him, "Can we handle 5,000 Forest Reserve at \$4.50" (p. 4406).

On June 25th, the day that Palmer bought 5,000 acres at \$5.50, some unidentified person in Washington, D. C., wrote to one Murphy at Spokane, offering 75,000 acres of scrip at \$2.50 to \$4.50. This letter came into Palmer's hands, and he forwarded it to Moon at Eau Claire (p. 4449).

On June 28th, Moon writes that Mr. Barber has bought 10,000 acres at \$4.50 (p. 4450). The purchase does not appear in the accounts, and the scrip was never located.

From these communications it would appear that Palmer, in June, actually bought 5,000 acres, and Barber actually bought 10,000 acres in the same month; that 3,000 other acres were offered to Palmer in May, and 5,000 other acres to Barber in June; and

that scrip to the amount of 75,000 acres was available at \$2.50 to \$4.50 per acre. Here is a total of 15,000 acres actually purchased, and of 8000 acres additional offered, and an unlimited quantity for sale at \$4.50 or less.

Yet the testimony of the defendants is that no scrip was really bought until August, when 6,000 acres was secured at \$5.35 (pp. 4486, 4771).

Which is to be believed, the testimony given on the stand, or the correspondence which is sworn to with equal solemnity as the genuine and correct evidence of current transactions, and which is asserted to be competent as reflecting the *res gestae*?

If the correspondence is trustworthy, what became of the scrip that was actually bought? and why do the purchases not appear in the accounts? And why did defendants not buy scrip when it was offered in unlimited quantities at prices substantially less than those which it is said were afterwards paid?

The necessary inference is that, either the correspondence is fictitious, or that Barber and Moon did not desire to buy scrip, or that both of these things are so.

In the view most favorable to the defendants, this evidence demonstrates some reasons why the use of scrip was not found desirable, there being the suggestion of divers inconveniences attendant upon the purchase and location of that article. In Mr. Moon's letter of June 28th, *supra*, mention is made of certain necessary delays incident to the purchase of certain scrip. At divers places in the transcript, referred to

herein, it appears that Barber and Moon were advised that the whole of each piece of scrip was required to be located at one time, which was not always possible, and that Mr. Blake understood that the slightest conflict with a prior entry would defeat an entire location. And Moon ingeniously confesses that they had a time getting rid of the 6,000 acres which they bought (*supra*).

At any rate, if the testimony and the correspondence prove anything at all, it is clear that the defendants had very vague purposes in the matter, and that there was abundant temptation for them to resort to the procurement of entries in preference to the purchase of scrip.

What has been said sufficiently shows that, so far as the Basin was concerned, there was never any idea of locating scrip. The acreage in that region was practically appropriated by entrymen when the Steunenberg contract became effective in April of 1902. Steunenberg himself declared that he did not care to use scrip until the entries were out of the way, and the entries, when completed in the summer of 1902, absorbed all the land desirable in the Basin, as was testified to by Wells and Downs. No scrip was bought until after the entries were completed, and repeated offers of scrip during that period were declined.

With respect to the Crooked River region and Tp. 6 N., R. 4 E., the facts stated and the considerations suggested hereinbefore in this brief are supposed amply to show that the location of scrip in those townships was never seriously entertained.

THE CHAPMAN EPISODE.

Lawrence G. Chapman, then a resident of Wisconsin, was employed by the Barber Lumber Company, in 1903, as general manager of its affairs in Idaho. He came to Boise in August of that year, and remained until the middle of November, when he returned to Wisconsin.

In August or September of 1904, Chapman returned to Boise, assumed charge of all the Barber Company's business, and opened an office, which has since been continuously maintained, and which has been conducted by Chapman as the company's local representative and general agent.

A set of books was opened at the Boise office in December, 1904, in which were entered transcripts of the journal and cash-book accounts, theretofore kept at Eau Claire, relating to the previous acquisition of lands in Idaho and all the expenditures on account of such lands. Since the opening of the local office, the books have been continued by the proper entries to show current transactions (pp. 2815 *et seq.*).

Throughout the period from October in 1904 to the taking of testimony in this cause, in March, 1909, the books of the Boise office, together with all the correspondence and other papers of the Barber Company concerning its land affairs in Idaho, have been in the charge and under the direction of Mr. Chapman.

In April, 1907, the grand jury of the United States

at Boise undertook an investigation of the methods by which the Barber Lumber Company had acquired large tracts of public land in Idaho. A subpoena **duces tecum** was issued to and served upon Chapman requiring him to produce before that body all the books of account, correspondence and others records in his office bearing upon the operations of the Barber Company in the acquisition of timber lands. In response to this subpoena, Chapman appeared before the grand jury and admitted under oath that he had in his possession certain of the papers called for, including the books of account, correspondence had since October of 1904, and substantially all of the other material designated in the subpoena. All of this he declined to produce. Thereupon report to this effect was made to the court, upon which report an order was made requiring Chapman to obey the exigency of the writ.

On April 9th Chapman again appeared before the grand jury and announced he refused and would refuse to produce any of the material called for, and filed a written statement setting out the grounds of such refusal. In this paper,—which is set out in the report of **Ex parte** Chapman, 153 Fed. Rep., 371, 373,—after setting up divers technical objections to the subpoena, Chapman states, as the substantial ground of his refusal, and the one upon which the case was ultimately made to turn:

“Sixth. I shall also have to decline to produce or exhibit to the grand jury for their consideration the records, &c., called for in said

subpoena, &c., on the ground, that the production of said records, correspondence, and other documents might tend to incriminate me, and that the subpoena to produce the same, and the order of the court in relation thereto, and the production would be contrary to the Fifth Amendment of the Constitution of the United States, which declares, &c.”

In the same paper Chapman states:

“I am the general manager of the Barber Lumber Company, and also a stock-holder in said corporation. I have been such general manager ever since the said corporation commenced business in Idaho, and have represented the corporation in this State. As such general manager, I have knowledge of its dealings in relation to procuring the government timber lands in this State; and also of all its business affairs within the State of Idaho. I have had control and custody of all the books, papers and records called for in the subpoena served upon me and referred to in the orders of the court in reference thereto.” (153 Fed. Rep., 373).

This action of Chapman was reported by the grand jury to the court, whereupon a hearing was had looking to Chapman's commitment as for a contempt. At this hearing, as well as in the subsequent proceedings on **habeas corpus**, Chapman was represented by Mr. Price, then the local attorney of the Barber Company, and Mr. Alfred A. Fraser, one of

the counsel in the present action for the same company (p. 4826). After argument, the court adjudged Chapman in contempt and ordered him committed to the county jail until he should comply with the requirement of the subpoena (p. 2925 **et seq.**; Plaintiff's Exhibits No. 145, E. F. &c.; 153 Fed. Rep. 374).

Thereupon Chapman, by his counsel aforesaid, applied to Circuit Judge Gilbert for a writ of **habeas Corpus**, upon which application such proceedings were had that, on April 26, 1907, Chapman was, after ten days' confinement, discharged from custody.

The premises of fact upon which this action was based are thus stated in the opinion of Judge Gilbert:

"While the proceedings began with a subpoena **duces tecum**, directing the petitioner to bring before the grand jury the books and records of the Barber Lumber Company, they finally resulted in an ultimatum from the court ordering him to produce the books and papers and submit them to the inspection of the grand jury, and giving the grand jury the authority, which was expressly denied to the petitioner, to determine what was pertinent, and what was not pertinent, to the subject which was under consideration. That subject had been announced in open court to be the investigation of the proceedings whereby the Barber Lumber Company had acquired title to timber lands of the United States in the State of Idaho. It was not disputed that the Barber Lumber Company was incorporated without the

State of Idaho, and that the petitioner was, and from the first has been, the manager of its business in the State of Idaho. It followed from this that the acquisition of title to timber lands must have been conducted on behalf of the corporation by the petitioner, and that everything that was done in that connection was done with his knowledge and under his direction. If, therefore, there was criminal violation of the law in acquiring those lands, there is every reason to assume that the petitioner must necessarily have been implicated therein, and that an inspection of the books would furnish evidence against him. That was one of the grounds of his appeal to the protection afforded by the Fifth Amendment and his refusal to comply with the order of the court." (153 Fed. Rep., p. 374).

"In the present case, it is not perceivable that there can be any question of the good faith of the petitioner in declining to subject the books to examination. Although they are in fact the books of the corporation, they are nevertheless to all intents and purposes his own books. They are records made by him or under his direction, and are in his charge and control. They refer to transactions which he has conducted. If they show the method in which the corporation acquired title to timber lands, they necessarily disclose his own acts. It is not denied that the presentation of

the books and their inspection by the grand jury is desired for one purpose only. This is fully shown by the record of the proceedings before the Court. It is that they be resorted to to ascertain what individual or individuals may be subject to indictment for violation of the laws of the United States in acquiring title to timber lands. I think it very queer that if the books contain the evidence sought, tending to prove the violation of law, there was reasonable ground for concluding that they might have tended to incriminate the petitioner, and that therefore his plea of privilege should have been sustained." (153 Fed. Rep., p. 377).

The fees of Chapman's counsel in these proceedings, as well as the costs of Court, were paid by the Barber Lumber Company and are embraced in the company's account of expenditures by its Boise office.

Although Barber and Moon testified that they were not consulted concerning Chapman's course in this matter, and that there was no correspondence whatever on the subject, it appears that on April 26, 1907, the day on which Judge Gilbert's decision was rendered Barber wrote to Chapman:

"I want to thank you, for the members of the company, and particularly for myself, for the position you took and your courage and dignity with which you carried through the consequences. It was not pleasant to be practically in jail, and I can assure you that your

course is most heartily approved by all the members of the Company," (p. 4749.)

Notwithstanding the inability of the grand jury to obtain the records in Chapman's custody, an indictment was returned in April, 1907, charging Barber, Moon, Kinkaid, Pritchard, John L. Wells and William E. Borah with the crime of conspiracy to defraud the United States in the transactions which are the subject of the present narrative. About the same time the bill in this cause was filed.

Mr. Borah, having been recently elected United States Senator from Idaho, demanded and obtained a severance from his co-defendants to the indictment, and was given a separate trial, which began in September, 1907.

Chapman was served with subpoena **duces tecum**, calling for substantially the same papers designated in the subpoena issued on behalf of the grand jury, and requiring him to appear as a witness for the prosecution in the Borah case and to produce those papers.

In response to this second subpoena, Chapman appeared in court, while the Borah trial was in progress, accompanied by his attorney, Mr. Bundy, who is senior counsel for the Barber Lumber Company in the defense of the present cause.

Mr. Bundy had come from Eau Claire to Boise at the request of the Barber Lumber Company, for the purpose of attending the trial of Senator Borah, in the interests of Barber and Moon, who were defendants to the same indictment, and as the company's

solicitor in this case, the bill in which had been filed in the preceding April (p. 2947). Although he did not appear for Borah he was in communication with counsel for the defense.

Mr. Bundy assures the Court that he did not know what was in the books and correspondence of the Barber Lumber Company in their Boise office, and did not acquaint himself with the contents of those documents, or undertake to advise in one way or another as to the production thereof (p. 2948). For some reason, however, Mr. Fraser and Mr. Hawley, attorneys for Senator Borah, both of whom, with Mr. Bundy, appear for the Barber Lumber Company in this cause, were anxious to prevent the company's books from being given in evidence against Mr. Borah, and were, at the same time, solicitous, as a matter of forensic tactics, that the objection to the books should not appear to come from their client. Accordingly, these gentlemen suggested that Mr. Bundy, on behalf of Chapman, and as Chapman's personal counsel, should raise an objection to the books based on Chapman's privilege as a guilty participant in the criminal matters of which the books were evidence.

Mr. Bundy, agreeably to this arrangement, upon the calling of Chapman as a witness, arose in Court, announced that he appeared as Chapman's attorney, and stated an objection to the production of the books upon the ground that the contents thereof might tend to incriminate the witness (p. 2949). At the same time, Mr. Bundy filed a paper, signed by Chapman, in

form and contents substantially identical with that filed by Chapman in response to the subpoena of the grand jury in the preceding April, the character of which has been above stated. In this paper, Chapman states that, as general manager of the Barber Lumber Company's business in Idaho, he has "had charge and knowledge of the dealings in relation to procuring Government timber lands in this State, and also of all its business affairs with the State of Idaho, and its books of account have been, and are now, kept under my direction." He declines to produce the documents required by the subpoena, "on the ground that the production of such records, books of accounts, and said other documents might tend to incriminate me" (Plf's Exhibit No. 145 II) (p. 5311).

Mr. Chapman was then examined in a preliminary way to the question of privilege. He was asked:

"Have you in mind anything now that would tend to incriminate you in connection with these books, any specific thing?"

To this he answered:

"Yes" (p. 2949).

Again he was asked:

"Will you name the books that you have in mind that might incriminate you?"

He said:

"The ledger, cash book and journal" (p. 2949).

Upon these sworn answers and the showing made in the paper drawn by his counsel, and upon the authority of the decision in the **habeas corpus** case,

Chapman was excused from testifying and the books and papers called for by the subpoena were not produced.

This occurred on September 30, 1907 (p. 2927). On the next day Chapman drew a check in favor of Mr. Bundy for \$600; one which is charged in the account as running to Mr. Hawley for \$250; and one charged as to Mr. Fraser for \$500 (Plf's Exhibit No. 143 S) (p. 5247). All these payments are charged to, and allowed by, the Barber Lumber Company. Those to Hawley and Fraser are said to be retainers in the present cause (p. 2896).

In the taking of testimony in this case, at Boise, in March, 1909, a subpoena was issued on behalf of the Government and served upon Chapman, with a **duces tecum** clause worded almost or quite literally after the two former writs just mentioned, and requiring the production of the identical books, correspondence, and other records and papers of the Barber Lumber Company's local office, which had twice before been called for and twice refused.

Chapman appeared for examination and placed in the hands of counsel for the Government a mass of documentary matter purporting and alleged to be the Barber Company's books or accounts and other papers designated in the subpoena. This he swore was precisely the same material which he had had in his possession in April and in September of 1907, when the former subpoenas had been served upon him, and which he had declined to produce on the

ground that the exhibition of the papers would tend to incriminate him. (p. 2942).

Chapman was thereupon requested to indicate the matters in these papers which he had supposed might be evidence of crime, and he answered that he knew nothing of that character in the documents. His testimony reads:

“Q. Now, Mr. Chapman, in answering on both of these occasions to the subpoenas **duces tecum** that these papers would tend to incriminate you, what did you have in mind as being of an incriminating character?

“A. I had no particular entry or entries in mind at that time” (p. 2942). * * *

“Q. Had you been guilty of any crime in connection with the acquisition of these titles?

“A. Not to my knowledge.

“Q. Did you think that you had been guilty of any crime?

“A. No.

“Q. Weren't you very well satisfied that you were innocent of all crime?

“A. Yes” (p. 2946). * * *

“Q. Mr. Chapman, have you any objection, now that it is all over, to indicate to us whether or not you ever, in your mind, formed any conception or surmise as to any particular offense which you thought that an unfriendly prosecution might be able to connect you with by means of any entries in these books?

“A. No particular offense” (p. 2950).

The explanation of the obvious discrepancy between his testimony and action in the present cause, and his action and sworn statement in the preceding cases, Chapman states:

"The answer (to former subpoenas) was made on the advice of counsel, and was made with the firm belief in our minds that the prosecution of these cases was in extremely unfriendly hands, both in the United States Land Office in Boise and in the United States Attorney's office. We also believe that there was some incentive for the prosecution of these cases which had been instigated by the defense in the Haywood-Moyer trials which were about to take place, because of the connection between Ex-Governor Frank Steunenberg and the Barber Lumber Company, and we also declined because of the statement which was made in open court by the United States Attorney that there was evidence before the grand jury—I read this from this exhibit—touching the acquisition of lands by the Barber Lumber Company, of which the witness Chapman might be and very likely was ignorant, and therefore he could not be permitted to judge as to whether or not the evidence which he offered is pertinent. We believed that the production of the books, without restriction, would place in their hands material which might be construed to mean incriminating evidence against myself, and on that account we

made the answer we did" (p. 2942).

Haywood and Moyer were charged with the assassination of Governor Steunenberg, which occurred on December 30, 1905, more than fifteen months before the issue of the first subpoena to Chapman. Chapman had not been charged with or suspected of that or any other murder, and his personal and business relations with Steunenberg had been intimate and friendly (p. 2944). Haywood and Moyer were tried in April or May of 1907, so that, whatever apprehensions of being implicated in the murder of Steunenberg Chapman may have had when summoned before the grand jury in April, must have been relieved before he was called in the Borah trial in September (p. 2945).

The unfriendliness of the then United States Attorney, which is suggested by Chapman as a further ground of apprehension on his part, does not appear, and is not suggested, to have been any personal animosity towards Chapman. But there is nothing to warrant even a suspicion that the District Attorney had, in April or in September, 1907, conceived any malice toward them, or that his unfriendliness was anything else than the disposition of a public officer to do his duty in the punishment of crime, and the redressing of fraud practiced upon the Government.

The extent to which Mr. Chapman conceived his immunity to extend is thus stated by him:

"Q. Mr. Chapman, is there anything in any of these transcripts which you have produced which you regard as tending to incrimi-

nate you in any offense against the laws of God or man?

"A. Not if carried through, and properly investigated, and properly explained.

"Q. Do you think that, if they were improperly investigated, they might tend to incriminate you?

"A. I think, improperly used, almost any book could be used to incriminate anyone, almost anyone.

"Q. Even your private expense account?

"A. Almost" (p. 2950).

It appears, then, that Chapman, on two occasions in 1907, swore that the papers which he now professes to produce contained matter which would tend to convict him of crime. On the first occasion he was so advised by Mr. Fraser, and on the second by both Mr. Fraser and Mr. Hawley, both of whom represent the Barber Company in this action; and on the latter occasion, the fact that the records were of incriminating character was certified to the court by Mr. Bundy, senior counsel for the defense in this cause.

It is, of course, not for a moment to be supposed that these gentlemen, or either of them, intended to obstruct the administration of justice, or to play fast and loose with the court, by withholding from the grand jury or in the Borah case any evidence to which they thought the Government entitled. We are bound to assume that the advice given by them to Chapman was predicated upon a **bona fide** belief that he had been guilty of criminal conduct in the acquisition of

the Barber Company's lands; and the recalcitrancy of Chapman is conclusive evidence of the professional opinion of the company's present professional advisers that the records of the Boise office did, at one time, disclose irregularities amounting to crime.

If Chapman swore truthfully in April and in September of 1907, why is three not in the records now produced the incriminating evidence then averred to be therein contained?

If the books and papers tendered in this cause were all the material in Chapman's possession in 1907, why did he lie in jail for ten days rather than produce them?

If, as Chapman now testifies, he did not consider the material to be incriminating when he swore that it was, but made his conditional immunity a pretext when his real reason was that the District Attorney was unfriendly, must it be assumed that he does not now regard a like equivocation as legitimate self-defense?

If, as Chapman avows, he is entitled, in virtue of his constitutional immunity, to suppress any evidence, however innocuous in itself, which might by any possibility, in any collocation, and by any unfriendly suspicion, be construed to prejudice him, though innocent, does he feel constrained to produce all his papers for the scrutiny of present counsel for the Government; or does he suppose that the prosecution of this cause is in hands which are friendly to the defense?

MINOR DISCREPANCIES IN THE DEFENSE.

Descending into particulars of defendants' testimony, a cursory examination discloses several individual instances of discrepancy which, independently of the general insufficiencies which have been pointed out, discredit the proof as a whole.

Both Barber and Moon testify that their acquaintance with Kinkaid and Downs was but casual and limited to one, or at most two, meetings, and that there had been no business relations between themselves and the other two men (pp. 4364, 4365, 4412). The testimony of the defendants, and the documents introduced by them as coming from their own files, show that Downs was on several occasions employed upon their business, that they knew of such employment, that on one occasion at least Barber suggested that Downs be employed to locate an entryman (p. 4722), that the company had Downs' estimates on the Crooked River lands, and actually bought those lands on those very estimates (pp. 4015, 4364, 4382, 4521, 4801, 4800, 4714, 4715, 2734, 4552, 4553, 4811). Downs, in his interview with Snow in the spring of 1903, professed himself to be so far in the councils of the company as to know why entries had been suspended in the preceding winter and he evinced an accurate acquaintance with the transaction relating to Sharp (pp. 3915, 3916, 3917).

Kinkaid was concerned in all these transactions from their inception through the acquirement of the claims in Tp. 6 N., R. 4 E. His removal from Center-

ville to Boise in November of 1901 seems to have been occasioned by this business alone, and he appears to have had no other substantial occupation in the following two years than the management of those affairs in which the Barber Company was concerned. In January of 1902, he was employed by Sweet to buy the Basin lands, and Sweet advanced him \$12,000 or \$13,000 for that purpose (pp. 4249, 4251, 4252, 4253). In all the subsequent transactions Kinkaid figures as procuring and disbursing agent. The following passages will indicate that Barber and Moon were thoroughly acquainted with the existence of Downs and Kinkaid and authorized their employment in their respective capacities.

Barber met Downs in 1902, and the latter acted as his driver or guide on trip into the timber (p. 4364).

Downs was employed by Governor Steunenberg and Barber and the Barber Lumber Company as guide, and in selecting scattered 40's and posting scrip notices (pp. 4015, 4364, 4030).

The ledger of the Barber Lumber Company and the report of Governor Steunenberg show that on August 15, 1902, Downs was paid \$250 for cruising and estimating scrip 40's in 6-5 and 8-5 (p. 4600).

On December 26, 1902, Barber, in a letter to Carson, advises the latter that he had directed Steunenberg not to buy until he had an opportunity to prove the correctness of Downs' estimates (pp. 4714, 4715).

In the winter of 1902 Downs wrote to Henry A. Snow that he had not done much locating that winter, but he expected to do better the following summer

(p. 3915), and in the spring of 1903 Downs, in giving as a reason that he had not located many people in the preceding winter, stated to Snow that an inspector had been to Idaho and had made an investigation and reported that everything was O. K. He guessed he (the inspector) must have been tossed (greased) up (pp. 3915, 3916, 3917).

On January 6, 1903, Barber, in a letter to Steunenberg, advises him that he is much interested in learning of the action he had taken with Kinkaid, and requested him to have Thornton or Downs to secure all the information they could with reference to the difficulties in the way of driving the river (p. 4515).

Steunenberg, in a letter to Barber dated January 21, 1903 says: "I asked Downs concerning the sources of his information as to the North Fork" (pp. 4521, 4798).

In the summer of 1903 Barber and Steunenberg employed Downs to go into the timber with Hoseley (p. 2733).

Upon Palmer's first visit to Boise, April 2, 1902, Downs was employed. When Moon came to Idaho, June, 1902, Downs was again employed and again when Barber, Carson and Moon were in Boise in September, 1902, Downs acted as driver and guide (pages hereinbefore given).

Barber, in writing Steunenberg, April 6, 1903, said: "I note what you say with reference to Kinkaid and see no reason why we should not complete our original arrangement with reference to land in the Boise Basin. * * *" (p. 4723).

In a letter dated January 21, 1903, Steuenberg writes Barber that he arranged to meet Taylor and Downs yesterday, and that they talked the Crooked River matter over quite thoroughly, and that Downs was quite pronounced in his statement that the timber there was better than that in the Basin, and that Downs had visited the Fall Creek region the preceding August (pp. 4521, 4522).

Barber, in a letter to Steuenberg dated January 22, 1903, says: "In the matter of the Kinkaid lands I would say that if you are satisfied that Downs' estimates are fair, buy eight or ten claims without waiting for Taylor" (p. 4523).

Again, on March 9, 1903, Barber, in a letter to Steuenberg, introduces one John Anderson, who he says wants to take up a timber and stone claim. Barber thinks Steuenberg might help him through Pat Downs or someone else to a good location (p. 4722).

On September 4, 1903, Barber, in a letter to Steuenberg, requests that he have Downs and a competent surveyor ready to take the representative of the Northern Pacific Railroad upon certain land indicated therein immediately upon the arrival of said representative at Boise (pp. 4552, 4553).

On the same date Barber telegraphed Steuenberg to arrange to have Downs and a competent surveyor where he can get them at a day's notice (p. 4574).

Barber, Moon and Downs at Boise together (p. 3937).

Downs located Hoseley on a timber claim August 4, 1903 (pp. 2756, 2757, 2759).

Steunenberg, in a letter to Barber (the first page of which is missing and consequently no date is shown), says: "I think it desirable to place the Basin deeds on record. Kinkaid wants to replace about twenty new ones. * * * The old parties will want the old deeds returned to them upon execution of the new ones" (p. 4790).

June 28, 1902, Steunenberg advises Palmer that he had sent Kinkaid \$5,000 to take care of the situation until Monday (p. 4469).

Palmer, with a letter to Moon, dated June 28, 1902, enclosed a letter from Governor Steunenberg in which he says: "In response to telephone communication from Boise yesterday that **entries** were being opened up, I send Kinkaid \$5,000 to take care of the situation until Monday" (p. 4468).

On December 29, 1902, Barber, in a letter to Steunenberg, says: "In making the deal with Kinkaid, have the deeds to run to A. E. Palmer the same as the other deeds you have been buying for us" (p. 4514).

On January 22, 1903, Barber, writing to Steunenberg, refers to the Kinkaid lands (p. 4523) and the Kinkaid deal (pp. 4720, 4796, 4797).

On the 1st of April, 1902 (p. 1404), April 4, 1902, (p. 4429), Moon employed Thornton to proceed to Idaho and report to Palmer. Upon his arrival at Spokane, Palmer started Thornton to Boise, Idaho, with a letter to Kinkaid (p. 1404). When Thornton arrived at Kinkaid's office, the latter gave him a plat of the lands he was to cruise and estimate in

Towns 6-4, 7-5, and 6-5, and he immediately started upon that duty (p. 4409).

Barber observed: "I think on a trip to Boise, or possibly through some correspondence, I learned that there was a man Kinkaid who was some sort of an agent for Steunenberg or was selling Steunenberg titles" (p. 4469).

On June 15, 1902, Palmer, in a letter to Barber, attached a report of Thornton, in which the latter said: "In the first plats that Mr. Kinkaid gave me there is some State selections, etc." (p. 4780).

Barber understood that Kinkaid had an option or authority of some kind from the entrymen enabling him to negotiate all of the entries at one time (p. 4508).

Steunenberg, in a letter to Barber dated July 27, 1902, refers to a telegram from Palmer protesting against the consideration named in the deeds from the timber entrymen, and Steunenberg says that the matter of consideration in the deeds is one which he left to the judgment and discretion of the entrymen and Mr. Kinkaid (p. 4492).

On August 4, 1902, Kinkaid prepared Hoseley's filing papers (p. 2782).

On January 6, 1903, Barber, in a letter to Carson, refers to Crooked River, and says that on that stream most of the Kinkaid entries are made (p. 4511).

On January 6, 1903, Barber writes Steunenberg: "We are, of course, much interested in learning what action you take with Kinkaid" (p. 4515).

Steunenberg, in a letter to Barber, February 14,

1903, says Kinkaid reports combination broken (p. 4529).

On May 29, 1903, Steunenberg writes Barber that Kinkaid has been obtaining second deeds (p. 4744).

Barber met Kinkaid on his first visit to Boise August or September, 1902 (pp. 4711, 4712).

Barber testified that he did not ask or solicit any person to make a timber and stone entry in Idaho or elsewhere, nor was Downs or any other person ever employed to secure lands for entrymen to locate upon (pp. 4479, 4485).

On March 9, 1903, Barber, in a letter to Steunenberg, after introducing one John Anderson as a man who desired to take up a timber claim, said: "I think you might help him through Pat Downs or someone else to a good location. John has been in our employ for many years" (p. 4722).

On September 16, 1902, one Andrew Hanson entered a claim on Crooked River; he was located by Downs, his entry papers were prepared by Kinkaid, as was also the deed conveying the title to said claim to the Barber Lumber Company through Rand, February 11, 1903 (p. 1498).

On May 6, 1903, Barber writes to Steunenberg and says:

"The enclosed is from two men who called upon me some time ago in Boise, and who are anxious to locate on Government land. I think their motive is to work for the Barber Lumber Company when operations are commenced. I suggest that if you can do anything

towards helping these men find desirable locations, you drop Mr. Hanson a line as he suggests" (p. 4724).

On June 17, 1903, Andrew Hanson, writing to Barber from Everett, Washington, says:

"I met Mr. John Anderson today. He came over to find out what your letter contained.
* * * If you think it is any show to go back to Boise and find a timber claim, please let us know" (p. 4724).

Barber, on June 24, 1903, in answer to Hanson, said:

"There is no more opportunity to make money by taking claims in the timber country in that vicinity than there was when the writer last talked with you" (p. 4725).

Barber testifies that A. E. Macartney of St. Paul, is the attorney for the Barber Lumber Company, and acted as attorney for the company in its original Idaho matters (p. 4498).

Mr. Macartney testified as a witness on behalf of the defendants in this cause, and, on cross-examination by counsel for the plaintiff, testified as follows:

"Q. You are a practicing attorney at St. Paul, Mr. Macartney?

"A. Yes, sir.

"Q. And you sometimes represent the Barber Lumber Company of Eau Claire in their professional matters?

"A. No, sir, never have represented the Barber Lumber Company.

“Q. Well, Mr. Barber then?

“A. No, nor Mr. Barber.

“Q. Who did you represent in negotiating for scrip?

“A. Mr. Barber and the Lumber Company—Barber Lumber Company—but not in a professional way.

“Q. You are not their regular attorney?

“A. No, sir, and never have been” (pp. 3966, 3967).

In view of the fact that Chapman, the Boise manager of the Barber Lumber Company, declined to produce before the grand jury and at the trial of William E. Borah, the books, records, documents and correspondence in relation to the acquisition of the timber lands involved in this cause, and that the defendants declined to produce in court during the period that the plaintiff was taking its testimony in rebuttal, or at the trial of said case, the letters, telegrams and papers received by, and copies of the same sent by, defendants, that were read into the record at the taking of testimony on behalf of the defense in this case at Eau Claire, Wisconsin, the manner in which said correspondence and papers were kept becomes significant. At the beginning of the transactions upon which this suit is based, Barber and Moon were both officers of the Northwestern Lumber Company at Eau Claire, Wisconsin, with offices in the same building. Copies of the letters written by Moon concerning said transactions were made in the old letter press copy book in which Mr. Moon's father,

in his life-time, kept his personal correspondence. This book is referred to in the transcript of the evidence as "Letter Book D. R. Moon E" (p. 4414). The correspondence of Mr. Barber concerning said transactions covering the same period was copied in the letter press book of the Northwestern Lumber Company.

On July 28, 1902, the Barber Lumber Company letter press book was started, and for four years letters concerning the transactions by Barber and Moon and the Barber Lumber Company were kept in all three of said books, copies of most of the letters, however, being made in the Barber Lumber Company book.

In April, 1907, at about the date of the finding of the indictment against Barber and Moon, and the institution of the present suit, the practice of copying letters was discontinued, and thereafter letters received and copies of the reply were filed together in a cabinet (pp. 4728, 4729, 4805, 4806).

The testimony fails to show in what manner letters received by Barber and Moon as officers of the Barber Lumber Company or in their individual capacities concerning the timber transactions in Idaho, were kept prior to the purchase of said cabinet, and there are filed in said cabinet a number of letters, some of them dating as far back as December, 1900, and neither Barber nor Moon can account for the whereabouts of said letters before the date of the inauguration of the present system of filing letters received. A greater part of the defendants' testimony is made up of correspondence between Barber and Moon,

Steunenberg and Palmer. Quite a considerable amount of this correspondence consists of telegrams received and copies of those sent.

It will be remembered that telegraph companies keep the originals of telegrams for about six months after the date of the receipt of the same; and that most of the telegrams referred to in the testimony or offered in evidence were six or eight years old. It is also to be remembered that Steunenberg has been dead for a number of years, and that Palmer has been a fugitive from justice in Canada since the institution of this suit and the finding of the indictment against him, charging him with conspiracy to defraud the United States, though the testimony of the defendants tends to show that he is at present in a sanitarium in Toronto, suffering from some mental impairment.

There was read into the record at Eau Claire a lead pencil memorandum of a letter purporting to be written by Barber to Long, December 10, 1900, to the effect that Barber would permit Long to convey title to claims which were being acquired by the Weyerhaeuser Timber Company in his name. It would seem that this letter related to a comparatively unimportant matter, though the same was produced from this cabinet and Mr. Barber has no recollection of where he made the memorandum or its whereabouts for more than eight years, or how it got into the files of the Barber Lumber Company (p. 4817).

The record also discloses the fact that a number of telegrams and letters which were written by Barber

or Moon, and which from their date, in the natural course of business, should have been copied in one of said letter press books, what purports to be a copy of the original is found among the files. One of these is a telegram from Moon to Palmer, in Moon's handwriting, dated April 4, 1902, but Mr. Moon cannot explain why the same was not copied in the D. R. Moon letter book (pp. 4756, 4757). This paper has never been folded, and Mr. Moon admits that that fact indicates that the telegram was written at his office and not down town (p. 4757).

There is another telegram dated April 7, 1902, from Moon to Palmer, which should have been copied in the D. R. Moon letter book. This is a lengthy and important message and contains a request that the same be repeated. Mr. Moon remembers that the message was repeated, but he cannot account for the absence of the repeated message (pp. 4757, 4758, 4759).

A number of the letters and telegrams read into the transcript by the defendants, referring to their letters and telegrams which they answered, Barber and Moon, in a number of instances were unable to account for the letter or telegram thus referred to.

On July 7, 1902, Moon telegraphed Steunenberg as follows:

“ Have taken matter up by letter with three parties in Washington.”

Moon attempts to account for the absence of these three letters by saying that one of the letters referred to was one written by Mr. Barber to Senator Spooner,

and that Mr. Carson had written Senator Allison, and that Mr. Macartney had taken the matter up with some Minnesota man (pp. 4810, 4811). Mr. Barber does not remember whether or not he received a reply to his letter to Senator Spooner (p. 4742).

On a letter received by Mr. Barber from Mr. Carson is stamped this expression:

“Answered October 27, 1902.”

Mr. Barber failed to produce a copy of the answer referred to, nor did he account for the absence of same (pp. 4729, 4730).

List of entries forwarded to Moon by Palmer, April 18, 1902, are not produced (pp. 4787, 4759, 4760).

An important letter is read into the transcript by the defendants, from page 661 A of the Northwestern Lumber Company letter book. This page is numbered in ink, and Mr. Barber accounts for its presence in the book by saying that it is frequently the case that a letter book contains unnumbered pages (p. 4739).

Notwithstanding the fact that the three letter press books referred to are in a good state of preservation, there are several pages missing from important letters read into the record by the defendants, and other important letters are so mutilated in such parts of them as, from the context of the letter and the places where the mutilation occurs, to suggest that such mutilation, impairment or excision was done intentionally and purposely.

Pages 13 and 14 of the Barber Lumber Company letter press book are missing (pp. 4725, 4733). This

is an important letter, and was offered in evidence by the defendants, and has been hereinbefore mentioned. Pages 44 and 45 of the Barber Lumber Company letter book are also mutilated. This is the letter written by Barber to William Carson, dated December 26, 1902, is also an important letter, and has been heretofore referred to in this brief.

Steunenberg's letter to Barber written in Washington, D. C., June 5, 1903, missing (p. 4721).

The letter written by Barber to Chapman, September 26, 1903, on page 255 of the Barber Lumber Company letter book, is also mutilated and strongly suggests excision (p. 4735).

See also letter on page 4790. Part of this letter is missing, and has been hereinbefore referred to.

In April, 1907, the grand jury at Boise was engaged in the investigation of the conduct of Barber, Moon and others in their timber land transactions in Idaho. Mr. Chapman, at that time and for three years prior thereto, had been the manager of the Barber Lumber Company, and for his failure to produce the books, records, correspondence, etc., relating to said transactions, before the grand jury in response to a subpoena **duces tecum**, he was adjudged in contempt of court and was confined in jail for ten days. Notwithstanding the fact that Mr. Barber was at that time the president of the Barber Lumber Company, and Mr. Moon was the secretary of that corporation, there does not appear in the letter press books or the filing case, hereinbefore referred to, of the Barber Lumber Company, even one letter or telegram from

Chapman to either Barber or Moon, or the copy of a letter or telegram written by either Barber or Moon to Chapman during the months of April and May, 1907 (pp. 4820, 4823).

Kinkaid testified that between 40 and 70 second deeds, for various reasons, were taken off claims in the present suit, and that Pritchard had secured these deeds from the several entrymen. Pritchard does not remember the persons from whom he secured these second deeds, nor does Kinkaid, Barber or Moon, nor do any of them remember the dates of the original deeds respectively, in lieu of which the second deeds were taken. Mr. Moon states that he had a memorandum of the dates but that he destroyed the same.

Moon, in a letter to Steunenberg, dated June 18, 1903, states that he sees no objection to securing new deeds in the place of some of the old ones in the Basin, except that all the land covered by these deeds has been re-deeded to the Company by Mr. Palmer. He suggests corrections in other deeds, and further states that "they should not bear date later than June 1st, as we already have deeds covering the same land from Mr. Rand." This suggestion on the part of Mr. Moon indicates that to his mind it is a small matter to have some notary antedate an acknowledgement (pp. 4501, 4502). None of the deeds from the entrymen in the Basin, conveying title to their lands, are recorded prior to the date of said letter, and the deeds from Palmer to the Barber Lumber Company are dated May 27, 1905, and June 28, 1905,

and the deed from Rand to the Barber Lumber Company is dated July 24, 1905 (pp. 3347 to 3362).

In a letter from Palmer to Barber, dated August 15, 1902, under the head of entries, Palmer says:

"I enclose complete list of entries in land office. Cost on all has been paid. Descriptions of the **first hundred should be correct, as they have been checked with land office receipt.**"

Barber does not know what has become of this list, and Moon says he probably put it in the waste basket (p. 4787).

There is a letter written by Moon to Steunenberg, September 3, 1903 (p. 4545), and two letters written by Barber to Steunenberg, September 4, 1903, (pp. 4552-4575). These letters are all copied in the letter press book hereinbefore referred to, and were read into the record as a part of the defense. They are of considerable importance as bearing upon the fact whether or not Hoseley was correct in his testimony to the effect that the plat book which is in evidence was given to him by Mr. Barber at Eau Claire on the 11th or 12th of September, 1903. The first of these letters was offered by the defendants to show that the book referred to was not given to Hoseley by Mr. Barber, but was forwarded with said letter to Governor Steunenberg. The Government in a measure, relied upon the third letter to show that Hoseley was mistaken in the reasons he gave that certain marks contained in the book referred to could not have been there when it was given to him by Mr. Barber. The defendants, however, urged that the first

two letters were mailed to Governor Steunenberg, but that the third letter was not mailed upon the date it bears, and was not mailed until some time after the 11th of October, 1903 (p. 4577).

Barber is not able to produce or account for the whereabouts of the report of Governor Steunenberg which "explains itself" and outlines the proposition which Palmer requested Barber to enter into, and which report was mailed to him by Palmer with a letter of February 21, 1902 (pp. 4367, 4368, 4369).

Steunenberg, in a letter dated July 1, 1904, said:

"I feel that certain features of my report and the situation here as well as my own relation with the company would be better served by personal statement. I have this in view. I expect to start for Eau Claire not later than next Wednesday" (p. 4617).

Governor Steunenberg arrived at Eau Claire the first part of July, 1904, and took with him a statement of his account, which was signed by him. The account which he had already prepared when he arrived at Eau Claire is not the account, however, which is offered in evidence by the defendants, purporting to be an account of Governor Steunenberg. Though Governor Steunenberg did not discuss the items in his account with either Barber or Moon, after going over the matter with Mr. Cotton, the bookkeeper of the Northwestern Lumber Company, he dictated another account, dated July 1, 1904, which is not signed, and is the one that is offered in evidence by the defense. The original account which the Gov-

ernor took to Eau Claire with him and which was signed, was destroyed (pp. 4683, 4695, 4698). The account of Steunenberg, dated July 1, 1904, is the last report of Steunenberg that is produced by the defense. All other accounts and reports made by Steunenberg to either Barber or Moon or the Barber Lumber Company, except the one last herein referred to, which was dictated to one of the stenographers of the Northwestern Lumber Company at the office of said company, are signed by Steunenberg.

The book accounts of the Barber Lumber Company, a copy of which was produced in Court by the defense, are marked as Plaintiff's Exhibits 143N to 143W (pp. 5220 to 5251), are unintelligible, and appear to be a copy of a ledger account of a corner grocery with a capital of \$200, rather than of a corporation with a capital stock of \$1,600,000. The order of the items in this ledger account is inverted. To illustrate, opposite the date of June 2, 1903, (Exhibit 143P), appears this notation:

"By April 10, 1902, Cost 97 titles (full claims) and for Sherman and Jennie Thompsons' claims (120 acres) as follows:

"78,200-10,975-32,925-56,250" (p. 5221).

Again, on same exhibit, opposite date June 30, 1903:

"June 23, 1903, deposited to your credit, \$50,000."

The next date in the ledger account is July 7, 1903. Opposite that date appears this item:

“By J. N. to 1903, paid W. E. Borah, before land board, \$350.”

And under that item appears the following:

“By 78 titles at \$950, \$74,100.”

The accounts which have been introduced by the defendants purporting to be reports and accounts of Steunenberg, are rendered in an inverse order; for instance, the account of Steunenberg dated July 7, 1903, accounts for moneys received by him from the Barber Lumber Company from February 11, 1903, to May 6, 1903, and is an account of disbursements, the first item of which is July 7, 1903, the next December 5, 1902, the next January 20, 1903, the next January 18, 1903, and so on. Thus, this account is not only rendered in an inverse order, but the items of disbursement are set out in that same manner, and accounts for disbursement made several months before the items which were to be disbursed were received (pp. 4601, 4602, 4603, 4604). There seems to have been no objection, however, to these accounts by the Barber Lumber Company, and the same seem to have been passed and approved by that company and allowed.

The second account of Steunenberg to the Barber Lumber Company is dated October 1st, 1903, and accounts for moneys received and expended by him in the interest of the Barber Lumber Company, covering a period prior to that covered by the account rendered July 7, 1903, namely, from April 10, 1902, to December of that year, and items in this second account occur not only in their inverse order, but cover items of disbursement of date covered by the first re-

port (p. 4600). In other words, the account of July 7, 1903, should have reported the financial transactions of Steunenberg with the Barber Lumber Company of the period covered by the account of Steunenberg of October 5, 1903, and *vice versa*. This latter account was likewise audited, approved and allowed by the Barber Lumber Company, and is offered in evidence as an account of its transactions with Steunenberg.

Moon testifies that the first money advanced by the Barber Lumber Company or by S. G. Moon or J. T. Barber, or anyone else, for the purchase of lands in Idaho, was a payment made to A. E. Palmer in the sum of \$38,763.75, on April 17, 1902. This was to Palmer and was to reimburse him for two checks, less exchange, which he, Palmer, had sent to Steunenberg on April 10, 1903 (pp. 4437, 4438). This amount is taken from the ledger and journal of the books of the Barber Lumber Company. The account of Steunenberg, Exhibit 143 P (p. 5221), and the books of the Barber Lumber Company show, however, that on April 10, 1902, Steunenberg purchased 97 titles, and the claim of Sherman and Thompson, and paid for the same \$78,200, and that amount is allowed in the ledger of the Barber Lumber Company as of that date. There is also an item of Steunenberg's account, Plaintiff's Exhibit 143 P (p. 5221), under date of June 7, 1903, which shows that on January 2, 1903, Steunenberg bought 78 titles at \$950, \$74,100. These are the only evidences that appear in any of the books of accounts of the Barber Lum-

ber Company, or at least all that they have produced, that show what the claims were that were purchased by Steunenberg on these dates.

THE TESTIMONY IN DEFENSE.

Most of the evidence in defense was given by Barber and Moon, and the remainder consists of the depositions of Wells, Downs, Kinkaid and Pritchard, of William H. Taylor, who had been employed by Steunenberg, and of Mr. Blake and Mr. Macartney, who had been attorneys for the Barber Lumber Company.

Mr. Borah, who had for several years represented the Barber interests as local attorney at Boise, was not called.

Palmer was not produced, and evidence was offered tending to show that he is of unsound mind and resident at a private sanitarium in Canada. Cross-examinations, however, elicited facts indicating that Palmer's mental disorder, so far as it exists, is no more than such impairment of the faculties as is caused by alcoholic excesses, which yields readily to treatment, and is cured by brief abstinence from strong drink (p. 4046 *et seq.*).

Steunenberg died on December 30, 1905.

In addition to the evidence professedly given for the defense, the cross-examination of the Government witnesses was most remarkably protracted, constituting probably half the testimony of those witnesses and being certainly of a volume enormously disproportionate to the examination in chief.

The reason for this is apparent upon the face of the situation. The Government, in order to elicit the facts upon which its case is predicated, was obliged to show by the entrymen whom the Barber Lumber Company had used that the entries had been made and the circumstances of their making. All of these entrymen, with perhaps half a dozen exceptions, whether they were or were not consciously guilty of wrong-doing, were naturally solicitous to purge themselves of any blame on account of what they had done. They were therefore predisposed to lend themselves to any cross-examination which sought to put their own conduct in a better light, and they accepted with avidity any suggestions with the color of innocence.

The extent of this susceptibility, on the part of witnesses who had been detected in falsehood, to suggestions which might reconcile their false statements with the truth, is well illustrated in the case of Edward Lockhart, who had imposed upon the land office by false oath that his final proof money had been in his possession for several years, whereas in fact he had received the money from Kinkaid a day or two before. On direct examination in this cause, Lockhart admitted that he had lied to the local officers (p. 1843). In Lockhart's cross-examination the falsehood was thus cleared up, the questions being framed and put by counsel for defendant:

“Q. This other question, as to where you got this money and how long you had had it. The answer is, money earned in business; have

had same for three or four years.' I will ask you, Doctor, if it isn't a fact that you borrowed this money upon credit established by your work, and credit you had established by accumulations from your work in the last three or four years, and if that isn't what you meant by saying you had had the money that length of time.

"A. Yes, sir.

"Q. You had the credit?

"A. Yes, sir.

"Q. And a man may have credit based on his property and earnings, and I assume that if he can go to the bank and get \$5,000, he is justified in saying it is the result of his earnings. Was that your understanding?

"A. That was my understanding; yes, sir"
(pp. 1849, 1850).

Lockhart had had, until it was suggested to him, no such understanding, he having, only a few minutes before, on direct examination, pronounced his account of the money a falsehood; if he had ever had such an understanding, his answer at final proof was none the less false and fraudulent, the paltry equivocation being intended to deceive the land officers; the fact was that he did not borrow the money on the credit of his accumulations, but the advance was volunteered by Kinkaid upon the expectation that he would get the land; and it does not appear that Lockhart had accumulated anything or had any credit.

For the reasons already indicated, almost all the

entrymen called as witnesses by the Government were interested to vindicate the propriety of the transactions in which, with themselves, the defendants had been concerned, and those entrymen, being guilty participants, were by the necessity of their position, adverse in interest to the Government. This fact was, at an early stage of the testimony, conceded by counsel for the defendants, who stated on the record that all the witnesses were hostile to the Government (p. 716).

Divers particular instances exemplifying this general hostility and sometimes vicious hostility of the entrymen will be cited later, as well as divers other examples showing the willingness of Government witnesses to grasp at friendly suggestions from the defense. For the present, it is desired only to observe that the defense was sought to be made, not only by calling persons identified in actual interest with the defense, but by the copious cross-examination of witnesses called by the Government but thoroughly in sympathy with the defense.

THE WITNESSES FOR THE DEFENSE.

All the witnesses called for the defendants, excepting two or three who were examined on matters of detail collateral to the substantial defense, were persons who were either directly interested in the cause or who had been associated with, or employed in some capacity, by the defendants.

John I. Wells, who had been most actively and most directly concerned in the procurement of en-

try-men, was, at the commencement of taking testimony in this cause, retained and paid by the defendants to attend all the sessions held for the examination of witnesses at Boise (pp. 4131, 4133, 4134). He was present during the examination of all the entry-men whom he had solicited and procured and aided by advancement of money, except at certain seasons at which he appears to have mingled and conversed with witnesses in waiting.

Early in the course of taking testimony at Boise, counsel for the Government applied for and obtained a rule in virtue of which all witnesses, save the one under examination, were excluded from the room in which the sessions were held (p. 862). Upon it being suggested that Wells was within this rule, counsel for defendants insisted that he should remain in the room, stating that they did not as yet know that he would be a witness (p. 878). Wells, therefore, continued to be present so long as testimony was taken at Boise, in the employ of the defendants and being paid by them for that service (pp. 4133, 4134), and during that period he conferred with defendants' solicitors concerning the evidence in progress (pp. 4131, 4132).

In March, 1909, while counsel for both parties were engaged in taking testimony at Los Angeles, Wells arrived at that city in company with Kinkaid, both having come at the request of the defendants' counsel to be examined as witnesses in defense. After being in Los Angeles for three days, Wells was offered for examination. Counsel for complainant objected

to the testimony of Wells on the ground that he was disqualified as a witness by his violation of the rule concerning the exclusion of persons intended to be called (p. 4071).

The rule of exclusion applied to Wells in a superlatively pre-eminent degree. The reasons which dictated the separation of the witnesses operated with a hundred fold more force in his case than in that of any other person. The suggestion, that counsel for defendants did not know that he was to be a witness, amounts to nothing more than saying that all future events are uncertain. Counsel knew that, if they should make any defense at all, Wells would be an indispensable witness. If they did not know that, it was at least the part of ordinary prudence and good faith to anticipate the need of Wells as a possible contingency. Even in the absence of any order on the subject, it would be an unheard of thing to pay a man to sit in the court room and listen to the evidence, and then to call him for the sake of rebutting that very evidence by means of the peculiar advantages he had taken.

In any case, even granting the competency of Wells as a witness, the fact that he had been hired to qualify himself for service in that capacity would make it impossible to attach any weight to his testimony. Other circumstances conducing to the same result suggest themselves without mention upon even a casual consideration of the facts heretofore stated. Any man who had been concerned in such transactions as have been recited would be expected to repre-

sent them as innocent; and, if in fact the conduct of Wells had been as criminal as the facts suggest, it would certainly not be expected that he would confess his criminality. The force of this suggestion is not weakened by the fact that, when Wells testified, he was under indictment in this Court for his share in the very matters to which his testimony was addressed.

Two facts apparent upon the face of the deposition given by Wells seem, of themselves, sufficient to discredit his entire testimony. In the first place, he is obliged to contradict quite a considerable number of the witnesses called by the complainant. Almost all of these witnesses were, as has been indicated, actively hostile to the Government, and not one had the slightest interest in the prosecution or any conceivable motive for making a false statement for the benefit of the Government. It is absolutely certain that none of them was under pay or could hope for any advantage in testifying; and yet Wells finds it necessary to say that ten or a dozen of these people have testified falsely.

Kinkaid and Pritchard, having been notified to attend at Los Angeles in order to give testimony for the defendants, were present during the examination of Wells against objection entered on behalf of the Government.

To obviate the objection, counsel for defendants stated that he would "be unable to conduct the examination of John I. Wells without the assistance of the parties' names" (p. 4070). In the cross-exam-

ination of Kinkaid occurred the following:

“Q. Did I understand that you are here, not only as a defendant in this suit, but as counsel?

“A. Well, now, I think that was a mere matter of compliment or something of that kind on the part of Mr. Bundy. I have never been employed as counsel in this matter. I am here as a defendant at Mr. Bundy’s request.

“STATEMENT BY MR. BUNDY: What I meant by saying that I wanted Mr. Kinkaid to assist me in this case was not as attorney, but due to his familiarity with the facts about which I wanted to interrogate Mr. Pritchard and in some instances Mr. Wells; that is what I referred to by saying that I wanted his assistance in the examination” (pp. 4331, 4332).

Granting that Kinkaid and Pritchard were entitled as defendants to be present during the examination of Wells, and each when the other was testifying, the frank statement of counsel for defendants as to his motive in requiring their presence makes the testimony of all three of little avail to the defense. If these most active participants in the transactions under inquiry could not sufficiently exculpate themselves from the guilty intimations afforded by the facts in proofs without hearing each other’s version, the inference is irresistible that on separate examination their several accounts would have failed to

cohere with each other. If the operations in which Wells, Kinkaid and Pritchard had been engaged were as innocent as the three assert testifying in each other's presence and comparing each the statements of th others with his own, the truth could have been just as well stated without mutual assisance.

The testimony of Kinkaid has one merit which distinguishes it from that of other witnesses examined for the defense, in that he did not require to be led. Kinkaid seems to have carefully prepared what he was to say, and he goes on at great length, in some instances for page after page, to unburden his mind with remarkably meager intimations from counsel as to the matters upon which evidence is desired. Thus, upon the resumption of session after an adjournment, the solicitor for defendants said simply, "Proceed, Mr. Kinkaid," whereupon the witness proceeded to deliver himself to the extent of seven pages of printed matter without the interruption of a single question (p. 4263 *et seq*; see also pp. 4240 *et seq*; 4252 *et seq*; 4277 *et seq*). Although when Kinkaid testified the testimony taken at Boise had not been extended from the stenographer's notes, Kinkaid had been informed of what at least one witness had said at Boise, and he undertakes to explain the testimony of that witness, who happens to have been Patrick Downs (p. 4290).

Pritchard is not only, as he says, very hazy about dates, but discloses many less accountable lapses of memory concerning things more substantial. Although it is an established and conceded fact that he

had taken second deeds from "a large number of entrymen," he was unable to explain why this was done, "unless it would be possible to do so when I was shown a particular deed," and he does not "recall anything from the regular routine of making those deeds" (p. 4197). He does not remember that Kin-kaid, by whose direction those second deeds were taken, had given any reason for desiring them; he can not tell how many such deeds were obtained; and he does not recall the names of any of the grantors except Link and Link's wife (p. 4213). Even the imperfections of Pritchard's memory, however, do not excuse the manner in which he, an interested witness, was boldly led at critical points of the direct examination (pp. 4192 *et seq*; 4195 *et seq*; 4198 *et seq*).

THE TESTIMONY OF BARBER AND MOON.

Barber and Moon were examined as witnesses in defense at Eau Claire, Wisconsin, in the office of their solicitor, and in the presence of each other, being called alternately and alternately rehearing each other according to the exigencies of the examination.

The most striking feature of the testimony given by these defendants is the extraordinary series of leading questions by which the greater part of it was elicited. Although it might be supposed that they, being the parties chiefly concerned in the affairs under investigation and most interested in the result of the cause, could state the facts more fully and more intelligently than anyone else, it will be observed that a comparatively small part of their testimony is spon-

taneous or independent narrative, and that the most important statements are made by way of categorical answers to questions involving the substance of the information sought to be brought out (pp. 4377, 4378, 4379, 4380, 4383, 4387). **et passim**).

A very large proportion, and the most material element, of the evidence adduced at Eau Claire, consists of a considerable volume of correspondence alleged to have passed between Barber and Moon on the one side and Steunenbergh, Palmer, Campbell or Carson on the other. These letters were produced from a cabinet in the office and were read into the transcript by defendant's solicitor. At the close of the examination, counsel for complainant, having assumed, as of course, that the papers would be filed as exhibits in the case, were informed that such action would not be taken, and that the only evidence as to the contents and genuineness of the documents would be that incorporated in the depositions (pp. 4826, 4827).

Afterwards, at Boise, at the close of testimony in rebuttal, counsel for complainant again requested that these papers be filed with the clerk of the Court. Defendants again announced that the evidence would not be filed, their solicitor saying that they "would not feel safe in producing them in court of placing them on file in this court" (pp. 3372, 3373).

The reason given for withholding the correspondence of the defendants is that Barber and Moon are under an indictment in the United States District Court for Idaho charging them with criminal conduct

in connection with the matters now in suit. That circumstance, of course, requires that their testimony be examined with cautious scrutiny, and it is to be seriously weighed in determining the value to be attached to the statements which they make (p. 3373).

In *Reagan vs. United States*, 157 U. S., 301, the Supreme Court approved an instruction given by the trial court in these words:

"You should especially look to the interest which the respective witnesses have in this suit or in its result. Where the witness has a direct personal interest in the result of the suit, the temptation is strong to color, pervert or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of that privilege. His testimony is before you and you must determine how far it is creditable. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far and to what extent, if at all, it is worthy of credit."

In the same case the Supreme Court, with reference to the degree of credit to be given to the testimony of defendants in a criminal case, continues:

"The fact that he is a defendant does not condemn him as unworthy of belief; but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is, there-

fore, a matter properly to be suggested by the Court to the jury."

SPECIFICATION OF ERRORS.

1. That the Court erred in dismissing the bill of complaint filed by said complainant in the said cause.

2. That the Court erred in not granting, by decree appropriate to that end, the relief prayed by the said complainant in the bill of complaint filed by said complainant in said cause, to-wit: The cancellation of all the patents named in the bill except those named on page 52 of appellant's brief, as to which the appellant concedes that the evidence in this record does not warrant cancellation.

ARGUMENT.

The fact that many of the entrymen deny that they made agreements antecedently to making their applications, does not go very far in any instance to show that agreements in fraud of the statute did not exist. As has been suggested, some of the entrymen had the notion, which is perhaps the prevalent popular notion, that there can be no contract which is not written. Probably most of them supposed, with more or less sincerity, than an explicit promise in express words is necessary to constitute a contract. But few, if any, had any conception of the contracts intended to be prohibited by the Act of 1878, or understood that such understandings as have been herein characterized were unlawful, as has been adjudicated in

the cases of Olson and of the Detroit Company.

133 Fed. Rep., 849.

200 U. S., 321.

All of the entrymen were disposed to put the fairest face possible upon their conduct, and the more so in cases where that conduct was felt to be compromising. All were hostile to the Government, as was expressly conceded by counsel for defendants; and most were manifestly well disposed toward, if not actively sympathetic with, the defense, as will appear from almost any cross-examination taken at random from the transcript.

Moreover, if the fact be that these witnesses, or any part of them, had entered into prohibited agreements with Wells, Kinkaid, Steunenberg, or other procuring agents, they were guilty of crime equally with the other persons, and the consideration already suggested with regard to those other persons applies equally to these self-exculpating entrymen. In several cases it appears affirmatively that entrymen testifying believed that they would be liable to criminal prosecution if in this cause they should admit having agreed to sell their lands before the making of the initial applications.

But notwithstanding the attitude of the entrymen and the other witnesses in this cause, their testimony as a whole viewed in the light of undisputed facts and circumstances establishes the fact that the entrymen made their entries in pursuance of an antecedent agreement or understanding with the agents of the

Barber Company that the titles thus initiated should devolve to said agents or to whomsoever they represented.

Counsel for defendants at the trial insisted that the fact of unlawful agreements is disproved by the testimony of numerous witnesses, charged with complicity in such contracts, who deny the existence of any illegal arrangements.

This contention assumes that any charge of crime is effectually disproved by the denial of the party accused. It establishes, if it is sound at all, that no wrong-doing can be proved by circumstantial evidence, provided only the wrong-doers agree to say that they did not do what the proven circumstances indicate. It is as much as to say that whatever people may choose to say in explanation of facts which bear against them should outweigh the reasonable and necessary inferences which sound judgment draws from the conceded facts.

The testimony of Barber and Moon, to the effect that they never made any unlawful agreements and did not know that such agreements were made, may be readily credited, but does not at all go to negative the existence of such agreements. Barber and Moon lived in Wisconsin, nearly two thousand miles from the scene of operations, they had little personal share in the details of the enterprise, and it does not appear, nor is there reason to suppose, that they ever negotiated directly with any of the entrymen.

The actual dealing with entrymen was left to Steunenberg and his lieutenants. Moreover, the contract

with Steunenberg, as has been pointed out, bound him to procure entries and deliver titles to the Barber Company in such quantities and under such a limitation of time as necessarily required agreements with the entrymen. And, as has also been pointed out, it is scarcely possible that Barber and Moon did not know that unlawful agreements had been made in the Anderson and some other cases which were directly brought to their attention.

The testimony of the other witnesses in defense, going to their own exoneration of guilty conduct in respect of prohibited agreements, is to be valued with reference to the fact that these witnesses, like Barber and Moon, were seeking to clear themselves of acts which were criminal and punishable.

The proposition underlying the whole case of the defense is, that the Court is bound, as a matter of law, to believe whatever is stated by the defendants and is not directly denied by somebody else.

This is only another form of the fundamental fallacy pervading the defendants' case, namely, that no such fraud as that stated in the present bill can ever be redressed.

Of course, if every court is bound to believe all that any defendants choose to say and which cannot be positively contradicted, then the defense set up in this case must be accepted as it is stated, and in this or in any other case of conspiracy, since conspiracies are not usually formed in public places, and since the prosecution does not ordinarily have access to the inner councils of conspirators, whatever account the

defendants see fit to give of their actions must be taken as literally true, which is only another way of saying that conspiracy is in its nature incapable of proof.

Fortunately, there is no such principle of law, evidence or common sense as that upon which defendants' case is predicated. To go no further than the Supreme Court of the United States, it is laid down by that tribunal that a court is not bound to believe testimony merely because it is not contradicted, and that a court is not bound to believe uncontradicted testimony that comes from interested witnesses, or that is intrinsically improbable, or that for other reasons does not impress the court with its credibility.

Quock Ting vs. United States, 140 U. S.

United States vs. Detroit Lumber Co., 200 U. S., 232.

Although, therefore, much of the matter testified on behalf of the defendants is not directly denied, most of it being in its nature incapable of positive disproof, it does not follow that the facts so sought to be established are undisputed. While much of the defense is, so far as precise contradiction goes, uncontradicted, it is by no means uncontroverted. And the Court is solicited to examine this testimony in the light of facts otherwise established, and with reference to its inherent credibility, to its consistency with itself, to the interest of the witnesses, and to other relevant considerations, and to judge whether or not it is with reason controverted.

During the taking of testimony in this cause, coun-

sel for the Government had found reason to apply to the Special Examiner, under whose direction the testimony was taken, for an order excluding from the Court room all witnesses except the one under examination. The taking of testimony had then, February 11th, been in progress a little over a week, and an examination of the evidence taken before that date will disclose ample reason for the request of the Government, if any reason were necessary for an order which is usually made as a matter of course. The only extraordinary feature of the incident is the fact that the request for the exclusion of the complainants' witnesses came from the complainant rather than from the defendants, who in an ordinary case would object to the presence of witnesses for the adverse party.

To the making of this order counsel for the defendants did not directly object, only observing with some irritation that they did not see the necessity for it. But immediately, and obviously by way of retaliation, they moved for, and actually obtained, an order forbidding counsel for the Government to invite witnesses to their office and have them interviewed by certain gentlemen appointed by the Government to assist counsel in the preparation of this cause (p. 863, *et seq.*

Directly thereupon, Mr. Fraser, of counsel for the defendants left the court room and went into the adjoining corridor, where a large number of witnesses for the Government were in waiting. To these witnesses Mr. Fraser announced that "they didn't have

to go into the room and talk to any of these gentlemen, or anyone else, in regard to any of the transactions relating to which they were subpoenaed to testify." (pp. 932, 933). A few days before, one of the witnesses under the Government subpoena, having been interviewed on behalf of the Government had gone directly to Mr. Fraser and reported that, "he didn't get anything out of me" (p. 866).

Mr. Fraser declares that, in admonishing Government witnesses that they need not converse with the representatives of the Government, he had no intention to prevent the persons so counseled from talking with the Government agents, but only to apprise the witnesses of their rights. Mr. Fraser does not mean that it is a part of his professional duty to dispense abstract legal wisdom gratuitously, or that his oath of office constrains him to stand at the street corners and proclaim the immunities of the law to an unsoliciting public. What he does mean is, in a case in which he is employed, when he perceives an opportunity to advance the interests of his client, he is entitled to communicate to persons strangers to the cause such advice as he considers useful to the interests which he represents.

The right, asserted by Mr. Fraser, to advise witnesses, even adverse witnesses, of their rights in dealing with the party calling them, was asserted by Mr. Fraser's colleague in even greater extent. On one occasion, when a witness for the Government was under actual examination by the Government, Mr. Bundy interposed with some friendly advice. Upon

objection being made to this interference, Mr. Bundy declared:

“If you knew anything about your profession, you would know that it is the duty of counsel to tell any witness his privileges and rights, and I shall do it as long as this examination goes on” (p. 1274).

The transcript shows several other instances in which Mr. Bundy exercised this right of counsel to come to the aid of adverse witnesses, and even to prevent a witness being entrapped in cross-examination. Conceding that counsel are bound to interfere to defeat the object of cross-examination, it may at least be observed that such interference defeats its own purpose.

Whatever may have been the intention of counsel for the defendants in these dealings with Government witnesses, it is clear that the necessary effect was to prevent the full disclosure of the facts. To forbid counsel for complainants to obtain statements from intended witnesses in advance of examination could only result in crippling the prosecution and render it impossible for the witnesses to be examined intelligently and effectually. All the witnesses were hostile to the Government; many of them were friends of the defendants or their counsel, and as such were advised by defendants' counsel; the prosecution was forced to proceed largely in the dark; and by the acts, if not through the intention, of the defense, much of the truth was suppressed or made obscure.

The fact, then, that many, or most, of the entry-

men deny that they acted under illegal agreements, goes but a little way to prove that such agreements were not the efficient causes of the making of the entries. Whether or not any one of them had entered into such an arrangement as is forbidden by the statute is not to be established by what he says in response to a question framed in the words of the statute and admitting of a categorical answer, **but is to be inferred from the arrangement as it is proved.** And the testimony to this point of these entrymen is to be weighed like other testimony, with reference to the considerations of self-interest and self-protection pressing upon the witnesses; to their natural disposition to state their actions in the light most favorable to themselves; to their antipathy toward the prosecution in this case, and their resentment of the Government's inquiry; to their friendly attitude toward the defense, which was so often developed by a sympathetic cross-examination; and to the inherent reasonableness of what they say and the harmony of the facts to which they testify, with other facts established in the case.

As has been suggested the fundamental defect in the defense is that it is, as a whole, incredible. Transactions of such extent and such complexity do not occur of themselves. So many individuals are not moved by spontaneous impulses arising at opportune times. Details of such multiplicity do not by accident concur to such singleness of result. The entire course of events evinces design, and the whole evidence proclaims procurement.

The whole defense rests upon the postulate that the declarations of the defendants must outweigh the proof afforded by facts. The testimony of the defendants is at variance with the inferences necessarily flowing from the facts established by the evidence, and it wholly fails to account for those facts upon any hypothesis which is consistent with the theory of the defense.

THE UNLAWFUL AGREEMENTS.

The entries, as a body, were procured by means of unlawful agreements for the sale and purchase of the land.

Let attention be directed for the present to the case made by the Government, and which rendered necessary a defense.

What has been mentioned suffices to prove that the defendants, in March of 1902, if not before, formed a conspiracy to obtain public lands in quantities immensely exceeding the area permissible by law, and that this conspiracy was intended to be, and was, made effective through the procurement, on a large scale, of entries under the Act of 1878. It will next be submitted that this procurement was accomplished by means of agreements for the acquisition of the lands which agreements are of the character prohibited by the timber land statute.

The evidence establishing this proposition is the whole of the evidence taken in the cause, and that evidence as a whole. The general character and effect of this evidence are indicated in the statement of the

case which is prefixed to this argument, and which sets out the transactions proved with what doubtless appears undue prolixity, but in reality quite meagerly, and by mention of only the most material features of the history. It is unnecessary, and it would be impossible, here to recapitulate all the circumstances tending to suggest that the entries were made in pursuance of unlawful agreements and to array the host of details which unite to render that suggestion a fixed conviction.

The force of this evidence lies not so much in any or in many circumstances, though there are enough of those which are pregnant of proof, as in the cumulative effect and the concurrent corroboration of all the facts.

The entire transaction, surveyed from its beginning to its end, appears to be a single enterprise, developed upon one general design, animated by a single motive, and executed upon certain uniform principles, with which all the incidents are entirely consistent. Whether viewed in its general aspect or examined in its details, the enterprise appears to have been conceived in fraud of the law and carried into effect by fraudulent means. No one can read this evidence without being profoundly impressed by the evidence as a whole, that the defendants procured the entries to be made, and that such procurement was effected by means of agreements, or of understandings which were the moral equivalent of agreements, entered into with the entrymen, or with most of them, in advance of applications filed, by which the entry-

men considered themselves bound to sell, and the defendants bound to buy, the lands to be entered.

From the beginning to the end of the Barber Company's transactions, there was never any market at Boise for timber land, there was never any public bidding or public purchasing, and there was never any such general assurance of a demand as would warrant a reasonable man, whether rich or poor, in making a substantial investment in distant and unproductive lands.

Without advertng in detail to these particular features of the particular cases, some of which have been set out in the course of the foregoing narrative, let the transactions as a whole be examined in its broader aspect with a view to the inferences flowing from a consideration of its general character.

It appears that the Barber interest bargained with Steunenberg for 25,000 acres of land in the Basin. More than 100 persons went out, mostly from Boise, made entries of as many quarter-sections, and sold to the Barber Company.

The officers of the Barber Company found it desirable to acquire a large acreage in the Crooked River district. Some 90 or 100 persons went out from Boise, made entries, and sold the entered lands to the Barber Company.

Mr. Barber and Mr. Moon, in 1902, recognized the necessity of obtaining lands in Tp. 6 N., R. 4 E., then unsurveyed. In the week before the township was opened, 25 or 30 persons went from Boise, guided by Downs, and selected tracts in that township; on the

day that the township was opened to entry, these persons were found in line at the door of the land office, most of them holding application papers prepared by Kinkaid; and all of them sold their lands, through Kinkaid, to the Barber Lumber Company.

The same thing happened, not once but 4 times. The whole transaction involved, so far as the present proof goes, at least 250 persons. In substantially all of the cases the same routine was followed, the same agencies were involved.

With respect to the character of the enterprise before Christmas, 1901, it is affirmatively shown as part of the defense that Wells had engaged, in consideration that the entries should be made, to supply the money necessary for that purpose. Speaking of the embarrassment under which Wells labored when the proofs came due in the first cases, Kinkaid thus testifies:

“Q. I will ask you whether or not, from what Mr. Wells told you, you were led to think that he had entered into any agreement or contract for reimbursing them if they did not come through, or was that a moral obligation?

“A. It was absolutely a moral obligation so far as I understood, but here Mr. Wells testified—he didn’t seem to remember the stress under which he was placed at that time, on most of those first filings that he had made. He had a great number of filings at that time, and if those first ones failed, those first ones were scared out of the Boise Basin, his occupation

would be gone, and he would be hounded to death by a great number of people for the return of it, if he didn't pay the money, and he was evidently laboring under great stress at that time * * *'' (p. 4238).

In the second period of its development, between Christmas of 1901, and March, in 1902, the enterprise was, as is shown in the defense, financed by William Sweet. This person's function in the scheme was to furnish the money with which the entrymen made final proof. In the entire absence of proof on the subject, it would not be presumed that Sweet did this as a mere gratuitous service, or that he exuded money in cash installments of \$400 in mere fatuous hope of its return. A man who has as much as \$22,000 in available funds, which sum Sweet is said to have invested, does not part with his money without some definite arrangement looking to its recovery. And here the evidence in defense discloses another moral obligation, this time on the part of the entrymen as the other moral obligation was binding on Wells, then the party financially responsible. Wells himself thus states it:

“Q. What was the scheme, if he (Sweet) was not to get any interest on his money?

“A. If he loaned the people this money, he would have a lien on all the people that he had loaned money to, and they would be morally obligated to do business with him if he wanted to buy the land in future, or to do something with it in the future” (p. 4172).

Taking together these two representations, both made on behalf of the defendants, we find a moral obligation resting on each of the parties to this scheme of procurement. Upon the part of Wells or the other party soliciting the entry to be made, was the distinctly understood duty to furnish whatever financial aid should be needed. On the part of the entrymen was the equally distinct obligation, merely moral, of course, because not legally enforceable, "to do business with" the party who supplied the funds, an obligation which is described as "a lien on all the people," and which was mutually recognized as a lien upon the lands entered.

To say that the obligation arising from such arrangement is "a merely moral obligation," is to say no more than that the arrangement is in violation of the statute. No legally binding contract of the character indicated can be made, because the statute deprives such contracts of any legal obligation. The statutory prohibition could not have been leveled against legally binding contracts, which the prohibition itself made impossible, but must have intended those contracts which were, by reason of the prohibition, unenforceable, and therefore of merely moral obligation.

"A **merely** moral obligation" is no more than an euphemistic synonym **for an** immoral contract. It has been decided, if authority **were** necessary to refute an absurdity so obvious as the contrary suggestion, that the agreements denounced by the Act of 1878 are not enforceable agreements, but are such

understandings as, by reason of the statutory provision, depend for their execution upon the voluntary action of the parties and upon their conceptions of honor and moral duty.

Olson vs. United States, 133 Fed. Rep., 849,
853.

In this state of mutual moral obligation, the "venture or enterprise" was offered by Steunenberg to Barber and Moon at Eau Claire, March, 1902, on what shall be assumed to be the first occasion of their acquaintance with what had been done. It may be assumed also that Barber and Moon did not inquire, and Steunenberg did not tell them, by what means 11,000 or 12,000 acres had been taken from the United States and brought into a single hand for sale, or explain how he came to have bargains with the entrymen for their claims the titles to which were still only inchoate.

It suffices, so far as the present argument is concerned, to observe, in respect of all the claims initiated before March, 1902, and then of record Barber and Moon bought of Steunenberg merely moral obligation. Not one of the applicants for whom Steunenberg acted had so much of an equity as a final certificate.

What Steunenberg had to sell, and what Barber and Moon bought, was simply the obligation of these applicants to convey titles in consideration of money previously advanced or promised to be advanced, or in other words, the benefit of the illegal agreements

in pursuance of which the existing entries had been initiated.

The defendants, therefore, by the Steunenberg contract, bought, not lands, or even equitable titles, but promises to convey future titles in consideration of past or future payments of money. They purchased an interest in a venture or enterprise which was of an essentially illegal nature, and which had been, to that point, developed through the contracts prohibited by the statute.

The prospective features of this enterprise were, in the nature of things, equally obnoxious to the law. The contract stipulated for an additional acreage greater than that already secured; and, as has been pointed out, this future acquisition necessarily and by intention, involved the procurement of entries. Having regard to the unlawful methods by which the enterprise had been brought to its then stage of development, and bearing in mind the relations established between Palmer, Kinkaid, Downs, Wells and Steunenberg immediately thereafter, it would, on general principles of probability, be presumed that its further execution was to be by the same methods.

As further evidence of the knowledge Barber and Moon had of what they were purchasing is the telegram of Barber to Moon, April 18, 1902, "Sweet's thirty thousand held by Steunenberg six months as guarantee to title" (4758).

The making of illegal agreements was, moreover, an essential element of the enterprise itself, and was indispensable to the practical execution of the scheme

by which the enterprise was to be effected. By the contract of March 12, 1902, Steunenberg was obligated to cause titles to 25,000 acres of public land to be perfected and delivered within six months. Even assuming that titles to 11,000 or 12,000 acres had already been legitimately initiated and could then be lawfully bargained for, the engagement of Steunenberg bound him to procure the purchase of 13,000 or 14,000 other acres, which involved the persuasion and procurement of 80 or 90 individuals, who should not only make entries and perfect titles, but should, every one of them, sell to the Barber interest.

To insure that nearly 100 persons, as yet unselected, unsolicited and unidentified, shall, within four months, be moved to travel forty or fifty miles by private conveyances, and each lay out \$450 or more to buy a tract of wooded land, would be considered, under any circumstances, a hazardous contract. To guarantee that every one of these unknown individuals shall agree to sell the land thereby acquired, within 60 or 90 days after perfecting title, to a certain purchaser, at a very moderate price, would, in any commercial condition, be pronounced commercial folly.

The rush to Crooked River in the fall of 1902, and the renewal of activity in that region in the spring of 1903, are not accounted for by any rational explanation, and are unaccountable save upon the hypothesis of procurement and in many of the cases there is evidence of pecuniary aid. It is said that Downs and Wells were exploiting the Crooked River country for

their advantage in respect of location fees. But the wooded lands had always been there, and there had been no rush to enter them. Downs and Wells could not persuade people to make the arduous journey and buy the land, to say nothing of paying \$25 **per capita** for the privilege, unless there was some assurance of a market; and almost everybody says, that there was no known market.

In these cases, and also in those in Tp. 6 N., R 4 E., to which the same observations substantially apply, there is evidence of more or less of that financial assistance which the defendants show created moral obligations binding upon both parties. Of this evidence, it is true, there is not so much in respect of the Crooked River and the 6-4 lands as in the Basin. That is, apparently, because people of better pecuniary ability were drawn into service after the poorer and more dependent classes had been exhausted.

It appears that procurement was practised to obtain entrymen for the Crooked River lands and for those in 6-4, and that money was supplied in all cases where it was needed.

It results from these considerations that the making of illegal agreements was inherent in the very nature of the case, as the case is stated by the defendants, and was dictated by the necessities of the enterprise which they undertook. The argument by inference to this effect is reinforced and confirmed by direct evidence, some of which appears in testimony adduced by the defendants themselves.

The whole transaction was so contrived and so con-

ducted as to create in the conception of the entrymen a moral obligation to convey his land to the Barber Company. For the chance to make "a little easy money," the intended entryman procured by Wells and many of whom were indebted to him; the land was found by Downs; the applicant was advised and assisted in the preparation of his papers by Wells and others herein mentioned; if money was needed for final proof, and very often, if not generally, it was needed, a fund was provided to aid deserving applicants; and, so soon as the entryman wished to take his promised profit, there was Kinkaid only too glad to make good that promise. It was impossible for anyone to accept all these kindly offices without becoming impressed with the sense that he was expected to do as his friendly assistants desired, as those people whose agencies he had used, and of whose machinery he had availed himself, a contract, tacit perhaps, but no less distinct, was implied in the whole proceeding, and a mutual obligation to reciprocal service grew out of the very nature of the transaction.

It is, therefore, nothing to the purpose to say that there were few, if any, formal contracts, or to point out that no explicit promises were exchanged; or to rely upon the declaration of this witness or the other that he acted upon mere suggestion of advantage, or vague assurance of aid, or in blind trust to the goodness of Providence; or to enumerate a goodly array of self-exculpating entrymen who indignantly repudiate the suggestion that they had been parties to

any criminal contracts. Some of these people appear to have supposed that there could be no contract that was not in writing, a circumstance mentioned in the case of the Detroit Company, 200 U. S., 321, as affecting the value of such denials. Most of them undoubtedly were sincere in supposing that the arrangement under which they had acted was not sufficiently definite to constitute a contract, and was "a merely moral obligation." It is not necessary, in order that the transaction shall be fraudulent, that the entrymen shall be intentionally and consciously guilty of wrong-doing, as also is held in the case of Detroit Company, *supra*, in the passage to be quoted *infra*.

It is sufficient to say that the methods pursued, and the form of the negotiations, were precisely those which would naturally be adopted by persons meditating an unlawful proceeding and seeking to evade the inhibition of agreements for the sale of the lands. In such a case much would designedly be left unexpressed, and the arrangement would be purposely formulated in such manner as to appear without the sense of the statute, and would be clothed in such innocent guise as not to shock the tender conscience of a well-intending entryman. But the result intended, and the result accomplished, was the identical result which the statute was framed to prevent. Call it an arrangement, an understanding, an implied obligation, or what else may soothe the moral sense with flattering euphemism, the negotiation with the entryman had all the effect of a distinct and binding agreement that he should transfer his title to the Barber

Company. If such a transaction is not unlawful, then the statute renders itself ridiculous by lending itself to evasion of its prohibitions and by providing the means for its own defeat.

On questions of fact precedents are generally of little weight, and other cases can seldom be controlling. Two reported cases, however, present states of fact so closely analogous to that embodied in the present evidence that the adjudications made in those cases have almost or quite the effect of an authority

Olson vs. United States, 133 Fed. Rep., 849, *supra*, involved just such procurement as is shown here; and upon the facts, which were much less extensive and far less cogent, the Circuit Court of Appeals drew the inference of unlawful agreements.

United States vs. Detroit Lumber Company, 200 U. S., 321, was even more strikingly similar upon the facts to the present case. Although all the entrymen, being called as witnesses, denied that any agreements had been made for the transfer of the lands to the lumber company, the Supreme Court, affirming the finding of the Circuit Court of Appeals, found that the transaction of itself proved the existence of such agreements. The opinion on these points reads:

“The entire management of these entries was in the hands of an agent of the Martin-Alexander Company. It furnished the moneys, both for the purchase prices and all expenses, and it is not easy to believe that it did all this on a mere expectation that after the entries

had been made i could purchase the timber. It is a much more reasonable conclusion that it had an understanding with the parties making the entries respecting purchases and prices. It is quite likely that the entrymen were not conscious of wronging the Government, and thought that if it received the full price demanded that was enough. The testimony of one witness suggests at least that they may have been advised that there was no contract unless it was in writing, and that hence they could conscientiously take the oath required in connection with an entry. So, without casting any imputation of intentional perjury on those parties, we agree with the Court of Appeals that the testimony points strongly to the fact that the entries were in pursuance of an understanding or agreement with the Martin-Alexander Company, that, as it was advancing all the money, the entrymen should convey to it the standing timber at a fixed price."

These cases, although perhaps not of controlling authority upon the questions of fact involved herein, show in what manner similar questions of fact have been determined, and constitute monuments for judicial guidance in dealing with present conditions. And it is submitted that, upon this evidence, and with proper respect for the precedents cited, it should be found that the entries herein involved were procured by, and made in pursuance of, such agreements as are prohibited by the Act of 1878, or such under-

standings as amount to such agreements and are equally within the prohibition of the statute.

Barber and Moon by becoming parties to the unlawful enterprise and venture of Steunenberg, Sweet and others on March 12, 1902, with knowledge of the scheme, and for the promotion of the common cause, made themselves parties to what had been done in pursuance of it before.

3 Green'l Ev. Sec. 93.

Jaynes vs. Loder 149 Fed. Rep., 21-30.

THE BARBER LUMBER COMPANY NOT AN INNOCENT PURCHASER.

In the contract of March 12, 1902, between Steunenberg and Barber and Moon it was agreed that they would organize a corporation under the laws of the State of Wisconsin and vest in that corporation the title to all the lands acquired under said contract; and that they would cause one-fourth of the stock issued by said corporation to be set aside as the property, and for the benefit of the said Steunenberg. (p. 4394.)

In pursuance of said contract the Barber Lumber Company was incorporated July 9, 1902, with a capital stock of \$150,000. The incorporators were C. W. Lockwood, James T. Barber and Sumner G. Moon and all the stock of the corporation was subscribed by James T. Barber, William Carson, C. W. Lockwood (brother-in-law of Carson p. 4362), C. D. Moon

and Sumner G. Moon. (4668). On December 17, 1902, however, the following numbered certificates of stock were issued to the following persons:

1. James T. Barber 330 shares.
2. Joseph G. Dudley 50 shares.
3. C. D. Moon 130 shares.
4. A. E. Macartney 50 shares.
5. William Carson 1 share.
6. H. S. Rand 50 shares.
7. Frank Steunenberg 125 shares.
8. Frank Steunenberg 125 shares.
9. Frank Steunenberg 125 shares.
10. C. W. Lockwood 100 shares.
11. C. W. Lockwood 100 shares.
12. C. W. Lockwood 100 shares.
13. C. W. Lockwood 64 shares.
14. L. G. Chapman 30 shares.
15. S. G. Moon 120 shares.

—(p. 4672).

At the first meeting of the stockholders of said company it was resolved that the company assume to carry out the provisions of said contract (p. 4668).

The defendants Barber and Moon were the first president and secretary respectively of the Barber Lumber Company and Mr. Moon is still the secretary of the company and William Carson is its president (p. 4668); Mr. Carson was the original Vice-President of the company and Mr. Lockwood was its treasurer (p. 4834).

In *McCaskill Co. v. United States*, 216 U. S. 504, 514, 515, the facts being very similar to those

in the present cause, it was urged on behalf of the appellant that it was an innocent purchaser. Mr. Justice McKenna in announcing the decision of the Court said:

“Does appellant occupy the position of the innocent purchaser, and is the Government precluded from receiving the relief prayed for in the bill because of such fact? The answer to the question depends upon a proposition of law, and whether J. J. McCaskill had knowledge of the fraudulent acts of Ward. This knowledge was, in effect, found by both the lower courts, and, giving to their finding the strength that should be accorded to it, we pass to the consideration of the proposition of law that the knowledge J. J. McCaskill, though president of the McCaskill Company, cannot be imputed to it because, as appellants’ argument is, while the knowledge of an agent is the knowledge of the principal, an “exception to the rule is that if the agent is acting in a matter in which he has a personal interest, or in communication with which he is interested with a third person, the presumption is that he will not communicate the facts in controversy.” And it is urged that “the rule should be more rigidly applied in cases of fraud or torts.” For these propositions appellant cites *Clark v. Metropolitan Bank*, 3 Duer, (N. Y.), 241; *Frenkel v. Hudson*, 82 Alabama, 162; *Allen v. South P. R. R. Co.*, 150 Massachusetts, 200; *Innerarity v. Mer. Natl Bank*, 139 Massachusetts, 332; *Atlantic National Bank v. Harris*, 118 Massachusetts, 147; *Loring v. Brodie*, 134 Massachusetts,

453; *Hightstown v. Christopher*, 40 N. J. L. 435.

Undoubtedly a corporation is, in law, a person of entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that in transactions with it when their interest is adverse their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it and to the officers who are identified with that purpose. Illustrations are given of this in *Cook on Corporations*, Sec. 663, 664 and 727. The principle was enforced in this court in *Simmons Creek Coal Company v. Doran*, 142, U. S. 417. In that case a corporation claimed title to land through a deed of its corporators, one of whom became its president. Of the effect of this the court said: "Associated together to carry forward a common enterprise, the knowledge or actual notice of all these corporators, and the president was the knowledge or notice of the company, and if constructive notice bound them it bound the company."

The case at bar is within the principle. The bill alleges that J. J. McCaskill and Robert E. L. McCaskill were copartners and engaged in the manu-

facture of lumber at Freeport, Fla. They incorporated this business, it is alleged, under the laws of Florida, "by the corporate name of J. J. McCaskill Company, with the said J. J. McCaskill as president and the said Robert E. L. McCaskill as secretary, owning a large majority of the stock of said corporation, with the entire management and control of the business and affairs of said corporation." There is no denial of this allegation. The interest of the incorporators and the corporation thus shown to be identical, not adverse, we think the ruling in *Simmons Creek Coal Company v. Doran* is applicable.

THE EXCESSIVE ACREAGE.

The case, as it is stated by the defendants themselves, embodies a fraud upon the United States in that the lands were acquired, admittedly, in pursuance of a purpose to acquire a larger area than the statute allows to the company or, collectively, to the persons composing the company.

The Act of June 4, 1878, provides that the public lands of the United States which are valuable chiefly for timber "may be sold to citizens of the United States, etc., in quantities not exceeding one hundred and sixty acres to any one person or association of persons, etc."

The testimony of Barber and Moon shows that, on March 12, 1902, they entered into a contract whereby they bound Steuenberg to procure, and themselves to buy, for the joint benefit of Steuenberg and themselves, 25,000 acres of public land, which was

then the property of the United States, and of which the United States was to be divested through the means provided by the Act of 1878. The maximum area which the three parties to the contract were entitled to acquire under that Act was 480 acres. The whole evidence in this case, including the testimony of Barber, of Moon, and of all the other persons concerned in the operations in question, establishes, without dissent that not only the 25,000 acres originally contemplated by the Steunenberg contract, but all the lands involved in this action, together with large areas besides, amounting to more than 60,000 acres, were taken from the United States and vested in the Barber Lumber Company through proceedings prosecuted under the Act of 1878, and prosecuted in accordance with, and in pursuance of, a scheme to obtain for that company an acreage enormously in excess of the area which the company was entitled to obtain in virtue of that statute.

Accepting the statement given by the defendants of their intentions in respect of the methods by which the stipulated acreage was to be obtained, it appears that a considerable fraction of the 25,000 acres was to be taken from entrymen who had already made partial titles under the Act of 1878, and that at least 4,600 or 5,000 acres additional was to result from the provisions of the same enactment. Although Barber and Moon may have expected to use scrip for the remaining 12,000 or 14,000 acres, the contract did not bind either them or Steunenberg to that means; it contemplated that there should at least be a choice

between the use of scrip and the purchase from entrymen; and the whole area contemplated by the contract and as much more in addition were in fact obtained through the procurement of entries.

The entire transaction, as it is represented by the defendants, was inspired by a purpose to employ the Act of 1878 for the acquisition of a larger area than the Act allowed to the persons interested, and all that was done in the execution of a fixed intent to evade the restrictions imposed by the law.

If, therefore, the case stood clear of all falsehood, illegal arrangements or other fraudulent means, it would present a fraud upon the United States in that the whole enterprise was animated by an intent to use the law to acquire for the Barber Company lands which the law did not intend to allow to any one grantee. Independently of any unlawfulness in the instrumentalities employed in the execution of the Steunenbergh contract, that contract constituted a conspiracy because it embodied an agreement of three persons to accomplish by concerted action an unlawful purpose, the collection into one hand of a large body of public lands by means of the law and in fraud of the law.

The clear purpose of the statutory restriction in respect of area is that no one person or corporation shall, through the provisions of the statute, obtain title to more than 160 acres of timber land. By this is not meant that lands entered and patented under the timber land act may not be sold, or that such lands may not be bought in any quantity by a single

purchaser. It is established by authority, and it is not questioned by this argument, that any number of tracts which have been entered, in the absence of any existing purpose to evade the limitation of the law, may afterwards be collected into single ownership like any other lands sold by the Government. In such a case, which is the case contemplated by the statute and the decisions construing the statute, the devolution of title from the United States, through the several entrymen, and into the hands of the ultimate purchaser, proceeds by the proper and legitimate operation of the enactment, unobjected to by any intent contrary to the statutory purpose; and the final accumulation of titles in one hand results in the natural course of commerce without the use of the statutory procedure to defeat the statutory prohibition.

Where a number of tracts of timber land have been purchased by individuals under the Act of 1878, and the titles have passed into private ownership, the Act is as to such lands **functus officio**, and the Government is no longer interested in the disposition of the property. If, in that condition of affairs, some one buys a large body of such lands from the individual owners, the transaction is effective without the aid of the statute, which has ceased to operate, and the accumulation of titles does not concern the United States which no longer owns the lands.

Where, however, two or more individuals, desiring to possess a larger area of timber land than they may lawfully obtain by direct purchase under the Act of 1878, form the joint purpose, in advance of any en-

tries made under the Act, to avail themselves of the provisions of the statute, and to obtain, through entries to be made by others, a large body of lands which they themselves could not enter, an essentially different case is presented. In such a situation there is necessarily involved a purpose to break through the limitation imposed by the law, and to do by indirection that which can not be done directly; and the execution of such a purpose results in the very thing against which it is the purpose of the restriction to guard.

When, under such circumstances, persons form the design to assemble several hundred tracts of timber land, being at the time the property of the United States, into a body to be owned by themselves, the devolution of titles to themselves to be effected through entries under the Act of 1878, in the accomplishment of that design the Act of 1878 is employed for a purpose which is at variance with the expressed purpose of the statute, and the United States is caused to part with its property in a manner which is contrary to that prescribed by the legislature. If a scheme of that character is put into successful operation, the enterprise is illegal because it involves an abuse of the statute, and the titles so obtained are vitiated, as against the United States, by the pre-conceived unlawful purpose in pursuance of which such titles are taken from the United States.

Unless such is the true meaning and effect of the Act of 1878, the restrictive clause is meaningless, and the attempt of Congress to limit the extent to

which one person or a single interest shall benefit by the enactment becomes a matter for mirthful mockery. The Act does not limit the right of an entryman to sell the land entered by him; and any individual or any number of individuals may make entry or entries for the purpose of selling to some one person or corporation. If, now, some intending purchaser of numerous tracts, in the pursuance of a design to that end conceived in advance of entries made, may, by offers to purchase lands or by means of stimulation and encouragement, cause entries to be made, with the intention on the one side to sell to him, and on the other to buy from the entrymen, then the Act of 1878 may be so used as to result in an accumulation of titles in one ownership which is palpably contrary to the intent of the statute.

That titles acquired through such a perversion of the law, and by so wresting a public land act from its intended use, are invalid and voidable at the suit of the United States, has been established in a case arising under a statute much less stringent in its limitations than the Act of 1878.

United States vs. Trinidad Coal and Coaking Company, 137 U. S., 160, was a bill in equity brought by the United States to cancel patents issued upon six entries under the coal land law, the several titles having been after the issue of patents conveyed to the defendant company. The coal land act provided that any citizen should, upon proper application, "have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not other-

wise appropriated, etc., not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment, etc." (Rev. Stat. U. S., 2347).

The bill charged that six persons, connected as officers or employes with the Trinidad Company, had formed a scheme to procure for that company titles to "coal lands in excess of 320 acres, contrary to the statutes of the United States in such cases made and provided"; that the six entries mentioned had been severally made by these persons in pursuance of such scheme, the entrymen being severally qualified to so enter; and that the entries were made for the use and benefit of the defendant corporation and did in fact thereafter, when the titles had been perfected, inure to such use and benefit.

The sole suggestion of illegality or fraud made in the bill was the averment of an intention, on the part of the persons concerned in the transaction, to enable the defendant company "to fraudulently obtain titles * * * to coal lands in excess of 320 acres, contrary to the statutes of the United States, etc."

It will be observed, by reference to the statute, which is set out in the opinion of the Supreme Court, that the coal land law does not, as does the timber land law, require that an entry made thereunder shall be, or shall be represented to be, made for the sole use and benefit of the entryman, or not made with speculative intent, or that the applicant shall not, and shall swear that he has not, agreed to sell or otherwise to dispose of the land to any other person or to

any corporation. Upon this ground, Mr. Justice Brewer, then Circuit Judge and sitting as such in the Circuit Court, sustained a demurrer to the bill, observing in his opinion, which is reported in 37 Fed. Rep., 180:

“Again, this is not one of those entries of land in which the party must, by the Statute, act in his own behalf alone, and file an affidavit that he is not doing so for the benefit of others. No such provision exists in respect to the purchase of coal lands. A party purchasing may contract before his purchase to sell, and that contract may be enforced; and I know no reason why he may not contract away his right to purchase, it being a valuable right given by Congress, having some of the elements of property, and with no prohibition upon its sale.”

Upon an appeal to the Supreme Court taken by the Government, the decree of the Circuit Court, entered upon the demurrer to the bill, was reversed, Mr. Justice Brewer, who had meantime been elevated to that Court, concurring in the reversal. The opinion of the Court was delivered by Mr. Justice Harlan, who said *inter alia*:

“The restrictions imposed upon the entry and purchase of the vacant coal lands of the United States have been so clearly expressed that no doubt can exist as to the intention of Congress in enacting the above sections. The Statute authorizes an association of persons to enter not exceeding three hundred and twenty

acres, and provides that only one entry can be made by the same person or association, and that 'no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof.'

'It is contended that the case made by the bill is not within the prohibitions of the Statute, although the demurrer admits that the Trinidad Coal and Coking Company acquired the lands in dispute pursuant to a scheme whereby the several tracts were to be entered for its benefit, in the name of certain persons, its officers, stockholders and employes—the title, when thus obtained, to be conveyed to the Company, which should, and did, bear all the expenses attending the entries and purchases from the Government. This contention cannot be sustained unless the Court lends its aid to make successful a mere device to evade the Statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the Statute. If the scheme described in the bill be upheld as consistent with the Statute, it is easy to see that the prohibi-

tion upon an association entering more than three hundred and twenty acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever. It is true in the present case, that some of the persons who made the entries in question were not, strictly speaking, members of the corporation, but only its employes. But as they were parties to the alleged scheme, and were, in fact, agents of the defendant in obtaining from the Government coal lands that could not rightfully have been entered in its own name, that circumstance is not controlling. Besides, it appears from the bill that when the scheme was formed and executed, Peter and other officers and stockholders of the association had taken the benefit of the statute, and that the lands originally entered and purchased by them were then held and owned by the company, and were in excess of three hundred and twenty acres. There is consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained because, if the facts admitted by the demurrer had been set out in the papers filed in the land office, the patents sought to be cancelled could not have been issued without violating the statute. defendant could not have been permitted

to do indirectly that which it could not do directly.”

In the case of the Trinidad Company it will be observed that the only vicious element was the intent to evade the restrictions of the statute in respect of the area to be acquired by the corporation. There was no purpose and no need to cause the entrymen or anyone else to make any unlawful agreement, or to commit perjury, or to swear falsely, or to do any other wrong than such wrong as was involved in making possible the acquisition of more land than was allowed by the law. The only fraud contemplated or practised was the mere failure on the part of the persons concerned to disclose in its full extent the purpose to which their several acts conduced; and that purpose was fraudulent only because, when fully accomplished by their concurrent action, it transcended the limits set by the statute.

In like manner the entries, taken severally, were not in themselves unlawful, fraudulent or otherwise objectionable. Each entryman was entitled to make his entry; to make it with the intent and under an agreement to transfer the land; and afterwards to execute such transfer in pursuance of such agreement. None of the entrymen made any false statements or otherwise acted fraudulently; and every entry was quite unimpeachable save in so far as it was vitiated by the unlawful scheme underlying them all.

It is further to be deduced from the same case that, even in the absence of positive deceit, it is a

fraud upon the United States to make entries, or to cause entries to be made, which would not be allowed if the intentions of the entrymen or other attendant circumstances were made known to the land officers. In the Trinidad Company's case the entrymen proved all that the law required; and their statements, so far as their statements went, were true and complete. But the mere suppression of a material part of the truth was held equivalent to a suggestion of falsehood; and the fact, that the patents could not lawfully have issued had the full truth been disclosed, was deemed to be ground for the cancellation of the patents.

United States vs. Keitel, decided by the Supreme Court of the United States in December, 1908, and reported in 211 U. S., was an indictment charging several defendants with conspiracy to defraud the United States by procuring other persons to make entries under the coal land law with a view to selling the lands to a corporation in which the defendants were interested. In this case the case of United States vs. Trinidad Coal and Coking Company, *supra*, was approved and followed, and occasion was taken to restate, elaborate and confirm the principles upon which the Trinidad Company's case was decided.

It results, therefore, that it is settled doctrine, and no longer to be questioned, that it is a fraud upon the United States to undertake to acquire, through a statute, a larger area of public land than the law permits to be acquired by the agency of said statute; and this is so even under a statute which does not forbid

contracts of sale to be made by entrymen before making entries, but permits the right of entry to be bargained away before its exercise.

If, therefore, it could be conceded that in case no falsehood or other fraud was practised or intended; that all the entries were intrinsically valid and the entrymen free of any illegal or fraudulent purpose; and that in all other respects the transactions of the defendants were entirely regular; in that event the fact would remain that the lands in suit were acquired by an abuse of the law, and the entries were the incidents of an unlawful scheme designed to cause the lands to be disposed of in a manner not contemplated by the legislature.

The execution of such a scheme is obviously a fraud upon the United States in that it amounts to a perversion of the statute from its intended purpose and effect and involves an abuse of the agencies provided by law for the disposal of the lands in one way so as to make those agencies operate to results at variance with the intention of the Government. Among the rights of the United States is the right to have its laws executed according to their true intent and meaning, to have the machinery of the law operate in accordance with the purpose of the law, and to have its Governmental policies carried into effect as they are defined by the expressed will of the legislature. If any of these rights are impaired, or their full exercise is limited, or the means provided for securing such rights are caused to conduce to results inconsistent with the results prescribed by law, the United

States is defrauded equally as if it were wrongfully deprived of public money or other public property.

United States vs. Stone, 135 Fed. Rep., 392, was an indictment charging the defendants with a conspiracy to cause certain life-preservers, not being of the quality prescribed by law, to pass the Government inspection by deceiving the inspectors. The Government did not buy the life preservers or otherwise lay out any money or part with anything of value on account of the transaction, the sole offense against the public consisting in the imposition practised upon the inspectors. To an objection urged on this ground against the indictment, the Court said:

“May not the United States be defrauded ‘in any manner or for any purpose’ except where it is deprived of its taxes, moneys or property? If there be a conspiracy between two or more persons to deceive the officers of the Government in the execution of a governmental duty for the purpose of securing their unwitting approval of what the law condemns, is not that a conspiracy to defraud the United States of one of its governmental functions? * * *

“The evident purpose of such concealment was to lead the inspectors to believe that the life-preservers made from the blocks furnished by the Nonpareil Corkworks each contained at least six pounds of good cork, and to induce them to approve what, if the facts should be known, they could not approve. Such a deception of the agents of the United States for

such a purpose is a deprivation of the United States of a right essential to the due administration of the law, and a defrauding of the United States within the meaning of section 5440" (pp. 397, 399).

So, to deprive the United States of the faithful service of its officers by procuring official infidelity, or by deceit or otherwise to impair, or to interfere with, the due execution of Federal laws, are frauds upon the United States:

Tyner vs. United States, App. D. C.

United States vs. Bunting, 80 Fed. Rep., 883.

Palmer vs. Colladay, 18 App. D. C., 426.

Curley vs. United States, 130 Fed. Rep., 1.

In *Curley vs. United States*, 130 Fed. Rep., 1, decided in 1904, the charge being conspiracy to defraud the United States by imposing upon the Civil Service Commission by a false impersonation, the Circuit Court of Appeals for the First Circuit, holding that such deception was a fraud upon the United States within the sense of Rev. Stat. U. S., sec. 5440, said:

"We have spoken of the popular acceptance of the word 'defraud,' and now as to its legal meaning. In *Burdick vs. Post*, 12 Barb. 168, 186, it is said to 'defraud' is to withhold from another that which is justly due him, or deprive him of a right by deception or artifice, and Bouvier adopts this definition. Thus the word in legal acceptance refers to rights, as well as to property and money. Moreover, when the word 'defraud' is used in connection

with the Government and the law itself, it naturally and necessarily has a broader and a different meaning than when used in connection with personal rights or in connection with individual rights of property. To illustrate, it is said in *The William King*, 2 Wheat. 148, 153, 4 L. Ed. 206, that 'whatever is done in fraud of a law is done in violation of it' and in that case a vessel, intending to go to a foreign port, complying with the requisition necessary to obtain a clearance for a voyage coastwise, was treated as employing a device in fraud of the law, by which she eluded the force that would have otherwise prevented her departure from port. Again, in *Lee vs. Lee*, 8 Pet. 44, 8 L. Ed. 860, which involved a question of jurisdiction in a slave case, where the question of jurisdiction depended upon place of citizenship, and as to that there was a question whether there had been an attempt to evade the law, after referring approvingly to the expression of the Court in *The William King*, to which we have referred, and in speaking of the alleged device and intent, it is said: 'Suppose the hiring had been for one week or one day, would any one doubt that it would have been done with a view to take the case out of the law of 1796, and would have been a fraud upon the law?' In *United States vs. Fox*, 95 U. S. 670, 672, 24 L. Ed. 538, it is said that 'any act committed with a view of evading the legislation of Con-

gress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States." * * *

A proceeding in which the Government is, by false representations or silent deceit, induced to part with its property to a person unqualified to acquire the property, or otherwise in a manner not intended by law, "in plain violation of the spirit, if not the letter, of the statute," is none the less a fraud upon the United States because the Government receives the same compensation as it would have received had the property been properly disposed of:

Hyde vs. Shine, 199 U. S., 62, 81, 82.

In the latest utterance of the Supreme Court upon this point, the same doctrine is reiterated; and it is distinctly laid down, overruling and able and earnest contention to the contrary, that it is a fraud upon the United States to procure public lands in violation of the law on the subject, even though the Government suffers thereby no pecuniary or other material detriment, and the only wrong done is a defeat of the statutory purpose. In this case, it was said by Mr. Justice White:

"The unsoundness of the argument, that as, when the prohibited entries were made, the price of the lands was paid to the United States, therefore the United States could not have been defrauded, is refuted by its mere statement. If it were true, then, in every case, however flagrant, where the lands of the

United States were procured in violation of express prohibitions of law, the element of fraud would cease to exist by the mere payment of the price; that is to say, the successful operation of the fraud would deprive the transaction of its fraudulent character. But the inherent weakness of the contention need not be further pointed out, because its wants of merit is conclusively established by the ruling in *Hyde vs. Shine*, where a like contention was decided to be without foundation."

United States vs. Keitel, 211 U. S., *supra*.

Applying these principles to the facts disclosed by the present record, it is obvious that the Barber Company acquired the lands in suit in a manner inconsistent with the intent of the statute and not contemplated by the legislature. Had it been proposed in Congress, when the Act of 1878 was under consideration to insert a clause legalizing the indirect acquisition of timber land through intentional and predetermined purchases from entrymen influenced to make small purchases, it is clear that such a provision could not have been adopted, because the sense of the legislature, as expressed in the text of the statute, was against giving to the proposed mode of disposal the effect of enabling the land to be obtained in large quantities by any one person.

Again it is clear that, if the full extent and effect of the scheme operated by the Barber Company had been known to the officers of the United States concerned in the disposal of the lands, the entries would

not and could not, properly, have been allowed to stand, and the patents would not have been granted. That this is true as a statement of fact appears from the hesitation and reluctance of the land officers to pass the entries because of their suspicion that some such scheme lay behind the sudden rush of applications offered by people unable, and, under ordinary circumstances, indisposed to buy timber land; and it was only because the land department was, at the time, prevented from discovering the real state of facts that the enterprise was prosecuted to a successful conclusion.

Such a suppression of the truth, by which a party is enabled to obtain something which would have been denied him if the full truth were made manifest, is held in the Trinidad Company's case, *supra*, to be equivalent to false suggestion in constituting a fraud.

To constitute such a fraud upon the United States, it is not necessary that actual deceit or other unlawful means be used. If the results obtained are contrary to those intended by the law, it matters not how intrinsically lawful may be the instrumentalities employed to produce such results; and if the statute is made to work counter to its own purpose, it is a fraud upon the statute, although no statutory provision may be violated. As is said in *United States vs. Fox*, 95 U. S., 672, cited in the *Curley* case, *supra*:

“Any act, committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may

properly be made an offense against the United States.”

To say that the entries were in themselves valid, would, therefore, be of no avail to the defendants, it appearing that the entries were made as a result of an unlawful scheme practised by the defendants, and that the entries were procured to be made by the defendants.

If it could be conceded that all the entries, considered independently of the circumstances actually surrounding them, were unimpeachable; that all of the entrymen were entirely honest and perfectly candid; and that in none of the cases was there any unlawful agreement, or so much as a tacit understanding of dubious propriety; even in that state of case, animating purpose of the enterprise, considered as a whole, was an unlawful purpose to wrest the operation of the statute from its proper scope; and the fact that the entries were brought up in pursuance of a purpose to defeat the statutory intent would vitiate the titles so obtained.

That the law looks to the substance of things rather than to the form, and regards results rather than means, is among the trite aphorisms of jurisprudence. A transaction of which the details are in themselves unobjectionable may be pronounced unlawful because the whole enterprise is permeated with an illegal purpose and the effect of the transactions as a whole is contrary to the principles or the policy of the law.

The proposition, that a court should look to the

general result of a scheme rather than to the merits of the several steps or instrumentalities by which that result is accomplished, is not limited in its application to public land cases.

In *Graffan vs. Burgess*, 117 U. S., 180, it appears that Mrs. Burgess, the appellee, a resident of Rhode Island, owned a summer home in Massachusetts, and had become indebted to Graffan, a mechanic, in some trifling amount, which with the costs of subsequent proceedings was less than \$200. The house of Mrs. Burgess was worth \$10,000, and the furniture therein was valued at \$3,000. Graffan brought suit in the proper court of Massachusetts for the debt due him from Mrs. Burgess, proceeded by attachment against her property, recovered judgment for the debt and costs, levied execution upon the defendant's house and its contents, brought in the entire property at the execution sale and received the proper official deed vesting in him all of said property. Upon a bill brought by Mrs. Burgess to vacate the deed, it was urged in defense that every step in the antecedent proceedings had been quite regular; the debt was due, the suit was properly brought, the attachment was levied by sufficient authority, the judgment was justly obtained and legally executed, the deed was sufficient, and delivery thereof fully warranted, and it was impossible to detect any invalidity in any detail of the transaction. In delivering the opinion of the Court, granting Mrs. Burgess relief, Mr. Justice Bradley, in answer to the contention just stated, observed:

“It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law.”

In the present case, the general result of the defendants' operations being to vest in them lands formerly of the United States to an amount many times greater than the United States intended them to acquire, and the confessed purpose having been to use the Act of 1878 to obtain an acreage enormously in excess of that which they were entitled to acquire through the operation of that act, it matters not how correct may have been the steps taken to this end, and it would not help the defendants if they could show the most fastidious scrupulosity in respect of every detail of the enterprise. Without regard to the hypothetical innocence of the means employed, a court should pronounce the transaction as a whole invalid by reason of the underlying, unlawful purpose, and hold the titles vitiated by the fraud upon the law involved in securing through the statute an acreage in excess of the statutory restriction.

In an endeavor to distinguish the *Trinidad* case and the present case it might be suggested that in the former the entrymen were parties to the scheme, while in the latter if the entrymen were parties to the conspiracy their entries would be invalid under the direct prohibition of the Timber and Stone law.

The answer to this proposition is that if in the Trinidad case the entrymen after having conspired with the officers of the company and before initiating their entries had induced a number of persons to make entries under the Coal Land laws upon an agreement to convey their claims to them subsequently (which they could have done lawfully not being advised of the conspiracy) and those entries had been involved in the suit, it seems clear that patents issued on those entries would have been cancelled too.

From what has been shown it is clear that Steunenberg intended to procure entries; that he did in fact procure entries; and that the entire execution of the contract was accomplished by his procurement of entries. Barber and Moon engaged to advance money for the purchase of scrip, "as and when required," and also, "as and when required," to advance money for the purchase of titles from entrymen (p. 4392).

Steunenberg was constituted the general agent for the execution of the contract, and the sole agent charged with actually putting into effect the purpose of the contracting parties, he alone being directly and actively concerned with the practical administration of the enterprise. He was also a shareholder to the extent of one-fourth of the capital stock of the corporation organized to receive, hold, and operate the purchases. That being the case, it matters not whether Barber and Moon knew what he intended to do or what he did. The liability of the Barber Company is fixed by what Steunenberg did, whatever expectations or intentions of a variant character may

have lurked in the inner consciousness of Barber and Moon.

The very nature of the contract, indeed, evinces a purpose to procure entries to be made, and makes such procurement necessary. Otherwise, why was Steunenberg employed at all? Except as to the 6,400 acres which he professed to control through contracts with entrymen, he had no property in the forests of the Boise Basin and Crooked River and no more interest or control over them than anyone else. The existence, the location, the topography and the value of the timber land were as well known to the general public as to him, and the Barber Company could, so far as these matters went, have proceeded just as well upon their own information as upon anything that he could tell. Barber and Moon did not even depend upon the information he gave, and everything that he had told was verified for them by Palmer before the contract was closed. If Barber and Moon desired aid in the selection of the most valuable timbered tracts, they would have employed practical woodsmen, as they did, for that purpose, employ their own experts, and in a matter so essentially technical they could have no use for a politician, a promoter, a city man and a man of the world, all of which, and nothing else, Steunenberg was. Such a man was obviously not wanted for any supposed ability to aid in the location of scrip upon timber land.

Unless Steunenberg was expected to procure entries to be made, through the exercise of his personal influence and by reason of the personal qualities and

accomplishments which have been suggested as his, he could perform no imaginable function in the achievement of a great commercial enterprise involving the purchase and milling of timber.

Unless, too, it was intended that Steunenberg should secure titles through entries under the Act of 1878, there was no reason for, and no significance in, the stipulation binding him to do his work within six months. If the location of scrip was intended, the celerity with which that could be done depended upon the rate at which the lands should be cruised and selected, and the promptness with which the necessary scrip should be supplied. Neither with the estimating, nor with the selecting, nor with the furnishing of money, nor the obtaining of scrip, did Steunenberg have anything to do. The only conceivable matter over which Steunenberg had any control was the making of entries; and the only reason that can be given for the limitation as to time imposed upon him is, that it was intended to stimulate his industry in the only sphere of activity in which he could be of service, and to get ahead of prospective entrymen not controlled by him.

The reason for the employment of Steunenberg and his associates appears upon consideration of the purpose sought to be accomplished, the existing situation of affairs as fixed by the law, and the legal obstructions to the execution of the scheme had in mind.

The United States owned a large body of timber lands which the defendants sought to acquire for themselves. The United States, as the owner of the

lands, had provided by law for their disposal in a certain manner, that is to say, by sale in limited quantities to individuals. The defendants desired to cause the entire body of land, being of an area hundreds of times greater than the acreage allowed by law to a single purchaser, to be sold to a corporation composed of themselves. This could not be accomplished directly, or under conditions then existing, or through the natural and spontaneous operation of the law. There was no way in which the defendants could buy or otherwise obtain the desired acreage from the owner, the Government having by statute declared the lands should not be sold in any such quantities as the defendants wished to buy.

To circumvent the Government in its expressed purpose not to part with the lands in the manner desired by the defendants, the members of the Barber Company devised and set in operation a scheme whereby the Act of 1878 was caused to work to the end desired by them, and to effect a result directly contrary to the expressed purpose of the Government. Being unable to accomplish what was sought, so long as the lands were left to the free and normal action of the law, the defendants instituted and carried into effect a system of procurement, through which the action of the law was stimulated, and as the result of which the Barber Company obtained indirectly the entire body of lands which the United States would not sell to it directly.

Steunenberg was employed and given an interest in the enterprise for the purpose of effecting the pro-

curement which was necessary to evade the limitations of the land law.

For this office Steunenberg was eminently qualified by his potential personality and local prestige, and the success with which his influence was exerted appears from the fact that the Barber Company obtained, by means of individual entries, not only the 25,000 acres originally stipulated for, but at least 35,000 acres more.

Not only were the entries in fact procured by Steunenberg, but the procurement was accomplished by an elaborate machinery instituted and maintained to that end. In addition to Steunenberg, as generalissimo of the forces, the enterprise employed Downs as locator, Wells as solicitor, two or three other persons to assist Wells in that office,

Kinkaid as fiscal agent, Pritchard as scrivener and notary, three or four attorneys as counsel, Palmer as and for disbursing officer, besides some other persons as auxiliaries in divers subordinate and more remote relations, among whom may be particularly mentioned Rand and Long, who, with Palmer, became trustees of the titles.

This bureau of procurement was conducted upon a settled system, using certain accepted and approved methods, and operating constantly and consistently, with systematic accuracy and the effectiveness of concerted action, to the one result, the transfer of property belonging to the United States from the ownership of the United States to the ownership of the Barber Lumber Company.

This purposeful and methodical procurement of entries, which the proof given by the defendants shows to have been within their initial intention, and which became by the use of their money an accomplished fact, presents a question as to the validity of the titles in suit which, in this precise form, seems not to have been considered in any reported adjudication.

The establishment by the defendants of an organized bureau of procurement for the administration of a system designed to cause titles to flow from the United States for the purpose of vesting them in the defendants, is a circumstance which differentiates this case from any other known to present counsel.

The question indicated, though novel, is not doubtful or difficult if to its solution be applied certain well-established principles and a few elementary considerations.

The case of the Trinidad Coal and Coking Company, *supra*, is clear to the effect, that a mere intent to acquire an area of public land beyond the statutory restrictions is a fraud upon the statute, and, if title to such excessive acreage is acquired in pursuance of such intent previously existing, the patents are voidable at the suit of the United States. In that case, as has been pointed out, there was, so far as appears, no active procurement on the part of the company. At any rate, the point was determined without regard to any solicitation or other means of effecting the unlawful purpose which may have been

used by the company, and solely upon the proposition that the purpose of excessive acquisition was fraudulent **per se**.

United States vs. Keitel, 211 U. S. 370, **supra**, follows the Trinidad Company case, and re-enforces the reasoning and conclusion of that case.

If, then, to a like unlawful purpose entertained by the present defendants there be added an active endeavor to secure the accomplishment of that purpose, and the exercise of persuasion, solicitation, advice or other influences calculated and consciously intended to effect the unlawful purpose, the transaction is, **a fortiori**, a fraud upon the law, and the result is even more plainly vitiated by the combination of fraudulent purpose and the intentional execution thereof.

Independently of authority on the specific point, the same result is reached by consideration of the principles underlying such a transaction as is presented on this transcript.

The capital object of the scheme formulated by the defendants was to effect the transfer of titles from the United States to themselves. Assuming that this object was in itself not unlawful, it could not be accomplished directly, and the defendants could not, themselves, invoke the Act of 1878 to further their design. The only way in which the lands could be reduced to a condition available for their purpose was through entries to be made by other persons. In the natural and ordinary course of affairs such entries would not be made in any such numbers as would meet the needs of the enterprise; and if the

law and the lands and the individuals were left to themselves, the defendants could not, within any definite period, assemble timber lands to any such amount as was desired. In this posture of affairs, the posture fixed by legislation, the defendants undertook to procure entries to be made so that they might buy the lands which could not be made available without resort to such artificial stimulation of the statute; and they did in fact cause hundreds of entries to be made for the purpose, existing in their own minds, of availing themselves of the factitious results of their endeavors to that end.

Without regard to any intrinsic impropriety in the purpose to buy large areas of timber land, the creation of an elaborate machinery to make public lands available for that purpose, in a manner not provided for by law, is a perversion of the law which constitutes a fraud upon the United States. It is clear that the Act of 1878 does not intend that entries shall be made for the sake of collecting titles in a single large owner, or that the activity of the statute shall be stimulated to that end. Although the entryman may sell his title, and any number of entrymen may sell their titles, and all may ultimately sell to a single purchaser, the act plainly does not contemplate that an intending purchaser of large areas shall cause entries to be made to facilitate his intention, or that in the operation of the statute hundreds of titles shall be drawn from the United States and lodged in a procuring purchaser through the intervening entrymen.

The bureau of procurement, established by the de-

fendants at Boise, was an instrumentality designed for the sole purpose of taking lands from the public domain and transferring them to the Barber Company. By its intended operation the titles were dislodged from their original ownership in the United States and caused to flow, through the entrymen as conduits, and to lodge ultimately in the company by which the process had been set in motion and by whose active endeavor the whole transfer was effected.

Upon the authorities already cited it is clear that the procurement of entries for the purpose of thereby divesting the United States of titles in a manner and to an end not authorized by the Act of 1878 is an abuse of the agencies provided by law for the disposal of the public lands, and as such constitutes the "deprivation of the United States of a right essential to the due administration of the law, and a defrauding of the United States."

United States vs. Stone, 135 Fed. Rep. 392.

To defraud another is defined, in *Burdick vs. Post*, 12 Barbour, 168, and by Bouvier in his *Law Dictionary*, as "to withhold from another that which is justly due, or to deprive him of a right by deception or artifice." *Curley vs. United States*, 130 Fed. Rep. 1. As between man and man, a person is clearly defrauded when he is induced, by any artifice or active concealment of facts, to part with his property as he would not have parted with if he were acting with full knowledge of facts and uninfluenced by misleading contrivance, and is caused by indirection to do

what he could not directly be persuaded to do. The very essence of fraud is that it accomplishes by deception or other contrivance something which could not be attained in the absence of such methods.

Let the present case be stated as one between individuals. The owner of certain property has refused, for good reason or bad, to sell that property, at any price, to a particular purchaser. The proposing purchaser solicits an agent to buy the property in his, the agent's name, stating that it can be sold for a higher price than the owner asks. The agent, seeing an opportunity to make a profit for himself, and induced by motive of individual gain, buys the property and thereupon sells to the person who has suggested the project. In such a case, it is clear that the owner is defrauded; and it is none the less a fraud upon the part of the ultimate purchaser, who procures the result not intended by the owner, because the intermediate purchaser acts in entire good faith, uses no falsehood, and is actuated solely by a purpose to benefit himself.

How far in such a case an individual, being defrauded by such contrivance, could secure relief against the fraud, is a question into which it is not necessary now to enter. The material consideration is that the case stated involves a fraud within the adjudicated definition of the term. In the actual case presented upon this record, it is not an individual, but the United States, which has been induced to part with property by means of a fraudulent contrivance precisely identical with that employed in

the case supposed. And the right of the United States to demand relief against fraud is much broader than of any individual, and extends to cases in which an individual defrauded would clearly be without redress.

In support of such extended right of the United States, and for instances of its application, it is sufficient to refer to the cases already cited, particularly to the case of *Curley vs. United States*, *supra*, and the authorities therein collated. Thus, in the case of *The William King*, 2 Wheaton, 148, it was pronounced a fraud upon the United States for a vessel, intending to sail for a foreign port in violation of the existing embargo upon foreign commerce, to take clearance for a domestic port, although in that case no actual deceit was practiced upon the customs officers and the only fraud consisted in a secret purpose to evade the embargo.

The case of the *Trinidad Coal and Coking Company*, *supra*, holds that it is a fraud upon the United States merely to suppress the truth for the purpose of inducing the land office to admit entries which those officers would not admit if they were informed of the full extent of the scheme to which the entries are incidental. In this case, as has been pointed out, the land officers at first refused to accept the entries because there was reason to suspect that the entrymen were acting by procurement in the interest of an enterprise which contemplated the acquisition of timber lands by a single purchaser in unlawful quantities; and it was only because investigation

looking to the discovery of that fact was stifled by the contrivance of the defendants, and because the land officers were unable to confirm their suspicions, that the entries were ultimately passed.

If entries procured in this way to be made, and titles procured by such means to be issued, are to be pronounced valid in the hands of the procuring parties, it must be because the Court believes that Congress, in framing the Act of 1878, contemplated such a proceeding as permissible under that Act, and intended that titles should be acquired in quantities beyond the statutory restriction by procuring the agencies of the statute to operate to that end. In view however, of the express provisions of the Act, and of its manifest caution to guard against such engrossment of the public land, it is impossible to believe that the Congress which enacted the law would have sanctioned a provision authorizing such things to be done, or that the framers of the Act would have approved such a scheme as is unfolded in this case, had that scheme been submitted to them as a legitimate result of their legislation.

It is, respectfully, but with much confidence, submitted that the Court will be unable to adopt any such belief, and that the procurement of entries to be made in the interest of the procuring party vitiates the titles thereby obtained by such party.

THE BUDD CASE.

The full dominion of the purchaser over his property, and the entryman's right to sell to whom he will

the land entered by him under the Act of 1878, does not conflict with the propositions hereinbefore submitted.

One who has entered a tract of timber land under the Act of 1878 is at liberty to sell his title as freely as he may sell any other property by him lawfully acquired:

United States vs. Budd, 144 U. S., 154.

Indeed, he has that right prior to the actual purchase and directly after making his initial application to enter:

Williamson vs. United States, 207 U. S.

What an entryman may do, however, and what another person may do with respect to the entryman and his entry, are distinct things. Although an entryman is entitled to make his entry and sell the land, and is entitled to make the entry for the purpose of selling the land, it does not follow that an intending purchaser in order to enable himself to obtain a certain tract, may procure an entryman to enter the land with a view to selling it to the procuring party. Assuming that in such a transaction the entryman's part is legitimate, the conduct of the ultimate purchaser is plainly obnoxious to the principle hereinbefore stated, that it is a fraud upon the law to do by indirection that which the law forbids to be done directly.

If that principle is applicable to such a case, it is not at all material that no agreement is made before entry whereby the entryman engages to sell, and the other party engages to buy, the land after entry. The

intent being to obey the law, and the procurement being an unlawful abuse of the statute to an unlawful end, it matters not that details of the procedure followed to that end are not in themselves improper.

The Act of 1878 does, indeed, prohibit agreements to sell the land made in advance of the application. But that does not imply that every entry shall be valid if only that prohibition is respected, and without regard to the motives, intent or conduct of the parties, or other matters collateral to the entry. Although an entry may have been made without an existing unlawful agreement, and the title may have been lawfully sold by the entryman, it is clear that the United States may avoid the title in the purchaser if it appears that he has procured, through an innocent entryman, the title to issue for his own benefit, and is himself not equally innocent as the entryman. In such a case, the transaction is fraudulent as to the beneficiary without regard to the trinsic propriety of the means by which it is effected.

This distinction, between the motives and conduct of the entryman, on the one hand, and, on the other, the motives and conduct of a third party, who injects himself into the transaction between the entryman and the Government for the sake of profiting by the entry, is sufficiently clear and is, moreover, one which necessarily inheres in the nature of any such tripartite proceeding. One person, it is obvious, may enter a tract of public land and sell it under circumstances and by reason of influences which are, as to him, legitimate; yet it may be that the circumstances

have been created, and the influences exerted, by another person, whose motives are unlawful, and whose conduct in respect of the entry is fraudulent.

In virtue of the same distinction it is possible, on the one hand, to concede to the entryman the right to make entry for his own profit, and to sell the land to his best advantage, and, on the other hand, to recognize the principle, that third parties may not procure entries to be made for their own benefit in fraud of the law. That this principle exists, sufficiently appears from the authorities which have been cited. That there is no difficulty in reconciling this principle with the entryman's full dominion over the land acquired by entry, will appear upon consideration of the decided case which asserts most sweepingly the liberty to sell such land.

United States vs. Budd, 144 U. S., 154, was a bill in equity whereby the United States sought to vacate a patent, issued upon a timber land entry made by Budd, upon the charge that the entry had been made in pursuance of an agreement between Budd and one Montgomery, to the effect that Budd should sell and Montgomery should buy the land. Both Budd and Montgomery answered the bill, denying under oath the existence of the alleged agreement, and there was no direct proof going to show the making of any such agreement. The evidence to that end relied upon by the Government consisted of the fact that Montgomery had, within the space of a year, bought twenty-one tracts of land recently entered under the Act of 1878, of which tract that entered by Budd was one,

together with some minor circumstances such as the appearance of identical witnesses at the final proof offered upon a number of the twenty-one entries mentioned. There is no evidence that Budd ever met Montgomery or ever knew of his existence until after final proof; or that Budd ever met an agent of Montgomery. In holding this evidence insufficient to warrant cancellation of the patent issued to Budd, Mr. Justice Brewer, delivering the opinion of the Court, said:

“But surely this amounts to a little or nothing. It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate, and implies or suggests no wrong. The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If, when the title passes from the Government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied.

“Montgomery might rightfully go or send into the vicinity, and make known generally, or to individuals, a willingness to buy timber land at a price in excess of what it would cost to obtain it from the Government; and any person knowing of that offer might rightfully

go to the land office and make application and purchase a timber tract from the Government; and the facts above stated point as naturally to such a state of affairs as to a violation of the law by a definite agreement prior to any purchase from the Government."

The effect of this ruling is to establish four things as permissible under the Act of 1878:

(1) An intending purchaser may make known his willingness to buy timber land at an advance over the Government price; (2) another person, knowing the intending purchaser's frame of mind, may make an entry with the expectation of selling the land to such intending purchaser; (3) the entryman may after entry, sell to the other; and, (4) the transaction is not within the statutory prohibition of agreements if there has been nothing further in the way of communication between the parties than is here stated.

In the case contemplated by the Court, it will be observed, there was involved no question as to the right of a third party to procure entries to be made in his interest, or as to the legality of such procurement. Although, from the fact that Montgomery had bought in a number of timber tracts, it was inferred that he had desired to obtain a body of timber land, it did not appear that he had caused Budd's entry or the other entries to be made, or had held out any inducement or made other efforts to encourage the making of entries, or had had any communication with any of the entrymen, before the entries were made, the only evi-

dence on the point being the fact that Montgomery had bought the lands after the titles were perfected. The fact of procurement, therefore, was not an element of the situation presented to the Court, and the bearing of such fact upon the possible case was not considered.

Nor, in the course of conduct stated as permissible under the Act of 1878, does the Court mention the procurement of entries of the procuring party. The only thing, even remotely related to such intentional procurement, which is suggested as legitimate, though the actual case embodied nothing of the kind, is the announcement by an intending purchaser of his willingness to buy timber land. It is not even said that such intending purchaser may express his wish to obtain any particular land, and it is noted as a material circumstance in the Budd case that there appeared to be no certain tract which was the object of specific desire. The most that is recognized as permissible in the way of inducement to make entries is the communication to the public that some person or some persons desire to buy timber lands at prices which make it profitable for individuals to make entries in response to the demand thus made manifest.

The situation, evidently, which is contemplated by the Court in the Budd case, and stated as that contemplated by the Act of 1878, is that condition in which, in the free and natural course of business, a demand for timber land has arisen, and individual dealers, seeking to supply that demand, advertise in the timber region the existence of a market, and so set the

statute in operation to supply the normal demands of trade. In such a case, the market is created by the operation of those natural laws which control the demand for all commodities; the intending purchaser who advertises his desire to buy timber land is but one of the ordinary agencies of trade by which the wants of the public are satisfied; the entries and the sales of the lands are in response to the spontaneous impulses of commercial need; and the statute works its intended result, the supply of timber to meet the natural demands of commerce.

There was no evidence in the Budd case that showed any connection between Budd and Montgomery or his agents before the entry was initiated or until some time after final proof had been made on said entry; or that any relations existed between them until several months after Budd was entitled under the law to sell his claim.

All this presupposes an existing demand which prompts the making of timber land entries upon individual initiative, and implies also an open market in which the individual has a choice of vendees and the benefit of competitive bidding. The statute contemplates that the entries shall be made in obedience to the call of commerce, and not upon the solicitation of some person who intends to engross to himself all the land which shall be entered; and it is supposed that the entryman shall sell at prices fixed by the laws of trade and not merely transfer the lands for a certain advance upon the cost fixed by the party who creates such market as there is.

The situation found in Idaho by the Barber Company, and the situation which the company created, differed essentially from that assumed in the Budd case as natural and legitimate. There was, when the Barber interest entered the field, no market for the Basin timber, and no demand for the lands except the company's own desire to obtain them in a very large body. The corporation did not advertise its willingness to buy timber lands, nor did it create a market for them, so that individuals, acting upon their own motion and with a view to the free disposal of their acquisitions, should make entries for the sake of profiting thereby in accordance with prevailing prices. On the contrary, the company chose to resort to personal solicitation, if not to modes of procurement more flagrantly unlawful; and the entrymen acted in few cases, if any at all, upon individual initiative, but almost universally in response to the active procurement exercised in the interest of the Barber Company.

That the entries were not induced to be made by an offer of an attractive price, but were produced by the solicitation of individuals with such arguments and under such circumstances as insured the ulterior transfer of the lands to the Barber Lumber Company, appears from a myriad facts in proof, too numerous to be more specifically indicated, but so cogent in their cumulative effect and by their concordant significance as to render argument to that point unnecessary. The recital hereinbefore made of the more salient features of the evidence, of itself, creates an

unresistible influence that the great mass of the entries, if not actually all of them, were made, not in response to any public bid addressed to the community, but under an impulse engendered by the Barber Company's bureau of procurement and applied with such intelligent discrimination as should insure the final devolution of the titles to that corporation.

The course of conduct pursued by the defendants in the transactions now under examination bears a very different complexion from that indicated in the Budd case as permissible. The Barber Company, so far from advertising its willingness to buy timber land, took pains to conceal, under the names of trustees, the fact that it had bought and was buying. This was done, as the defendants state, to keep secret the activity of the company in the market and so to prevent competition on the part of other possible purchasers. Instead of finding an existing market, or of creating a market in obedience to normal demands, the defendants sought to prevent the making of a market and to disguise such demand as there was for timber land. And it appears in the testimony of the majority of the witnesses examined on this point, that they did not, when their entries were made, know of any market for such lands or of any one seeking to purchase them.

There being no public notice given, and no knowledge on the part of the public, that either the Barber Company or any other purchaser was willing to buy timber, there could, of course, be no market for that commodity, and there was no natural and legitimate

motive to induce the public to make entries under the Act of 1878. The statute was, plainly, not called into operation to meet any existing and manifest demand of commerce. Whatever activity was manifested in the making of entries, must, therefore, have been altogether factitious and the result of artificial and proposed procurement.

The Steunenberg contract was essentially one for the procurement of entries by artificial stimulation in a region where no natural causes existed to induce the making of entries.

It appears, then, that the Barber Company did not, after the manner stated in the Budd case as legitimate, go into the timber region and offer to the community a price for timber land which would set in motion the Act of 1878 to supply a normal demand of commerce. And this the company omitted to do for the avowed reason that such a course would have created a market in which the company would have been obliged to compete with other bidders. Had that condition arisen, the price and the supply of timber land would have been regulated by the natural laws of trade, and the Barber Company would have wholly failed to profit by the elaborate machinery which it had instituted for the sake of causing entries to be made which should inure to its interest.

An excellent illustration of the motives of the company and its attitude towards an open market and freedom of trade is afforded by certain correspondence introduced in the course of the defense. In this correspondence, which is offered for the purpose of

showing that the Crooked River entrymen were not bound by contracts to sell to the Barber interest. Steuenberg reports that some of those entrymen are negotiating with a view to selling to a higher bidder than the Barber Company; he evidently considers this assertion of independence a breach of faith on the part of people who had used the machinery of the Barber Company, and stigmatizes as "local grafters" those who are seeking to seduce the subjects of his procurement (pp. 4518, 4525).

These facts, the absence of a market, the purposed prevention of a market, the suppression of competition, the avoidance of advertisement, the cautious selection of persons intended to be entrymen, the use of private suggestion to cause the making of entries, the exercise of combined influence and concerted action through the bureau of procurement, the careful contrivance by which every entryman was guided to the company's purchasing agent, the designed restriction of the market, so that the company was the only possible vendee of the lands, together with other details illustrating the accuracy and effectiveness with which the cunningly designed machinery of the company operated to draw titles from the United States, through hundreds of individual conduits, and collect them with unerring precision in the company's reservoir, all abundantly distinguish the transactions shown by this evidence from the legitimate function of the timber land statute.

If an intending entryman at Boise thought to make an entry, it was because some solicitor of the Barber

Company suggested it to him. If he sought to find a suitable tract, the company controlled the timber region, and the individual could obtain access to the land only through Wells and Downs, the latter of whom indicated the quarter section to be taken. When the individual undertook to file application papers, he was referred, generally, to Wells or Kinkaid for assistance. If he needed witnesses at final proof, they were provided by the company's agents. If he needed money to pay for the land, it was advanced by the company's resident fiscal agent, and the amount advanced was deducted from the purchase money when the company bought the land. When the entryman had made his proof, he was directed, with more or less urgency as the case required, to Pritchard for the execution of his deed, and from Pritchard or Kinkaid he received whatever price the company saw fit to allow for his services in its interest.

The entire innocence of all the entrymen is assumed in the foregoing argument, because that argument is intended to proceed upon the case as the defendants themselves state it in their defense, and to point out that the defense itself admits a system of procurement which is at variance with the intent of the statute, and essentially violative of the statutory provisions. To stipulate, as Barber and Moon, in effect, stipulated with Steunenberg, that, within six months, more than one hundred and fifty individuals in a community of six thousand souls shall make and perfect entries under the Act of 1878, and that every one

of the one hundred and fifty shall be caused to convey the title obtained by him to the contracting parties, they being strangers to the entries and to the entrymen, and at a fixed price, implies as necessary an amount of suasion and a kind of arrangement which are palpably inconsistent with the intended effect of the statute, if it does not, indeed, necessarily involve the making of agreements expressly denounced by the statute.

It is, perhaps, conceivable that all that was contracted for might be accomplished without violating the prohibition of agreements for the sale of the land. But, even in that case, the very purpose of that very prohibition would be frustrated. An agreement, in advance of entry, to sell the lands intended to be entered, is, as is observed in *Hartman vs. Lumber Company*, 199 U. S., 335, not intrinsically wrong; and a statutory prohibition of such agreements proceed, not upon any grounds of natural morality, but solely in the enforcement of some statutory policy. In this case the Act of 1878 forbids agreements to sell the land because such agreements lend themselves to just such engrossment of timber land as is shown in this evidence, and make possible the very monopoly of sales which the Steunenberg contract was intended to assure. Granting that it is possible, through a multitudinous series of fortunate accidents, to effect the same result by way of procurement, unaided by the agreements specifically prohibited, the result is the same result which the prohibition of agreements was intended to prevent, the making of entries which

were to the interest of the procuring party.

That an entry may be made without a prior agreement for the sale of the land, and yet be invalid under the Act of 1878, because it is made on speculation for the use and benefit of another, is held, in a case involving procurement similar to that shown here, by the Circuit Court of Appeals for the Eighth Circuit.

United States vs. Detroit Lumber Co., 131
Fed. Rep., 668, 679.

That entries procured to be made in the actual interest of the procuring party may be avoidable as against that party, although the entryman may not have been consciously guilty of any impropriety, is established upon the authority of the highest Federal Court.

In the case of the United States vs. Detroit Timber and Lumber Company, 200 U. S. 321, there appeared to have been practiced a scheme of procurement much like that shown here, though on a much less extensive scale, whereby certain entries had been made to the ulterior advantage of the procuring party. Although all the entrymen testified that they had entered the lands without any agreement to sell the same, the Supreme Court held the entries fraudulent, Mr. Justice Brewer remarking:

"It is quite likely that the entrymen were not conscious of wronging the Government, and thought that if it received the full price demanded that was enough. * * * So, without casting any imputation of intentional perjury on those parties, we agree with the Court

of Appeals that the testimony points strongly to the fact that the entries were made in pursuance of an understanding or agreement with the Martin-Alexander Company, that, as it was advancing all the money, the entrymen should convey to it the standing timber at a fixed price" (p. 329).

In *United States vs. Keitel*, 211 U. S., *supra*, the distinction between an entry made by a person in his own actual interest and one made by a person in the interest of, and as agent for, another, is pointed out and insisted upon; and *United States vs. Budd*, *supra* is cited as not inconsistent with that distinction.

If the entire innocence of all the entrymen could be established, the fact would still remain that the Barber Company has acquired more than 50,000 acres through the Act of 1878, by means of the procurement stipulated for in the Steunenberg contract.

THE IMPEACHMENT OF WITNESSES.

Certain objections interposed by the defendants in the examination of witnesses, seem intended to suggest that the Government, having called the entrymen, is bound by what they say. This suggestion, if intended to be urged, proceeds upon a radical misconception of the rule of evidence respecting the impeachment of a witness by the party calling him.

The rule of evidence, in any case, goes no further than to inhibit an impeachment of the general reputation of a witness called by the party. If it ever was the law that a party was precluded to contradict his

own witness, the rule in that form has been obsolete for a century; and for that period at least it has been competent to show the falsity of the party's own witness, even though such showing should incidentally reflect upon the veracity of the witness.

“It is exceedingly clear that the party calling a witness is not precluded from proving the truth of any particular fact, by any other competent testimony, in direct contradiction to what such witness may have testified; and this, not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief.”

1 Greenleaf on Evidence, Sec. 443.

“The primitive notion, that a party is morally bound by the statements of his witnesses, no longer finds defenders, although its disappearance is by no means very far in the past. In the early 1800's the judges were still engaged in repudiating this false notion of the basis of the rule against impeaching one's own witness.”

Wigmore on Evidence, Vol. 2, Sec. 897.

Compare:

Wigmore on Evidence, Vol. 2, Sec. 898.

Alexander vs. Gibson, 2 Campbell, 555.

Bradley vs. Ricardo, 8 Bingham, 58.

Brown vs. Bellows, 4 Pickering, 187.

Whitaker vs. Salisbury, 15 Peck., 545.

Certainly the supposed rule of evidence is subject to the qualification that the witness, whether or not he is impeachable by the other side, may be discredited by the Court. And this is so especially where the witness himself supplies the material for his own impeachment.

In *McLean vs. Clark*, 31 Fed. Rep., 501, decided in 1887, District Judge Brown, since a justice of the Supreme Court of the United States, said:

“It is insisted, however, that, as *McLean* (the plaintiff) was called as a witness by the defendants, they are bound by his statements that the transaction was **bona fide**, and that *Shaw* has no interest in this suit. We do not so understand the law. While it is undoubtedly true, as a general rule, that a party offering a witness in support of his case represents him as worthy of belief, and will not be permitted to impeach his general reputation for truth, or to impugn his credibility by general evidence, he has never been considered as bound by his general statements as to motives or intention, or his **bona fides** in a particular transaction, but may draw any inference from his testimony which the facts stated by the witness seem to justify. Particularly is this true where the party is compelled to prove his case from the mouth of the opposite party. In a similar case, *Chandler vs. Town of Attica*, 22 Fed. Rep., 625, Judge Wallace held, in passing upon a similar issue, that the Court was ‘at

liberty to disregard the testimony of the parties, so far as it is incredible, and to interpret the transaction in a way consistent with the ordinary conduct and motives of business men.' If the story of the witness be consistent in itself, the party calling him is, to a certain extent, bound by his testimony, but if his recital of facts is inconsistent with his theory, the Court is at liberty to draw its own inference from them."

Other cases asserting the right to cross-examine an unfriendly witness and to urge the incredibility of his testimony are:

United States vs. Budd, 144 U. S., 154 **supra**.

Becker vs. Koch, 104 N. Y., 394.

Cross vs. Cross, 108 N. Y., 628.

Arms vs. Arms, 113 N. Y., 646.

Webber vs. Jackson, 79 Michigan, 175.

Emerson vs. Wark, 185 Mass., 429.

Garny vs. Katz, 89 Wisconsin.

1 Starkie on Evidence, 284.

If one of these entrymen, being called as a witness for the Government, had sworn that he was a thousand years old, it may be conceded, **pro argumento**, that the Government would not be allowed to prove his real age. But no Court would feel itself bound to accept such a statement, or to render a decree accordingly, upon the assumed theory that the complainant had vouched for the veracity of the witness. Granting all imaginable estoppels against the Government in this cause, the Court, at least, is free to

believe or disbelieve what the Government witnesses say.

In view of what has been said, showing the conceded hostility of the Government witnesses to the Government, their bias in favor of the defendants, which is disclosed throughout the cross-examination, the Government was frequently surprised in its direct examination, it is clear that counsel for complainant were entitled to cross-examine the witnesses called by them.

United States vs. Budd, 144 U. S., 154, **supra**
Clark vs. Saffery, Ryan & Moody, 126.

In proving what a man did, it is competent to show what he said when he was doing what is intended to be proven, although what he said may be immaterial to the fact done, or even though his declaration may be incompetent to prove the facts declared.

It being necessary to show that final proofs were made, the Government was obliged to show that fact by the exhibition of the proof papers, and this involved the production of the papers in their entirety. It was not competent in this instance, any more than in any other, to suppress supposedly immaterial portions of the paper, or to mutilate the documents for the sake of eliminating evidence presumed to be objectionable. Whether in any given instance particular statements are material to the present issues, or whether any certain matter is competent to prove some fact extrinsic to the proof, are questions for other considerations. The papers as a whole are necessary to establish the fact that the proofs were

made, without regard to the intrinsic competency or materiality of particular statements, and without regard to the proof of the papers in detail or as a whole.

Assuming, then, that some or all of the statements contained in the final proof papers are, taken independently, not proper matters of evidence, the papers must stand as competent to establish a fact material in the cause, and for that purpose the papers must stand in their integrity. If it should be proposed to refer to these papers for the sake of thereby ascertaining some fact other than the making of proof, the availability of any particular statement for any particular purpose is a question to be determined upon considerations applicable to the particular question.

In relating the transactions which are the subject of this litigation, frequent mention has been made of statements made by entrymen in their final proof papers, and occasionally a fact is stated as shown by some entryman's sworn declaration made in the course of his final proof. If in any or all of such instances, the statements quoted are immaterial, or the facts stated are not properly proved by the quotations made, the statements and facts are, of course, not to be considered in tracing the history of the transactions.

The narrative itself, it is believed, will in every instance show its own justification for the use made of the final proof. In all cases where the entrymen were examined, their proof papers were shown to them and were identified by them as their sworn declarations made by themselves in the course of the

entries. In these and all other cases the proof papers, being documents required by law to be prepared and filed, and having become a part of the official record, are evidence of the fact that the statements contained in the papers were made in the prosecution of the claim. The competency of such evidence to prove that the statements were made is as clear as the competency of any other records to prove their own contents. In any situation, therefore, where it is material to know what one of these entrymen said on final proof, the papers are competent evidence. In any case where it is material to ascertain the fact to which testimony was given at final proof, the entryman's sworn statement as to that fact made contemporaneously or nearly so with the fact itself, is manifestly evidence, of more or less persuasiveness according to the declarant's veracity, and the account heretofore given of the transactions in suit shows in repeated instances how the narrative is made clear, and how incidents otherwise obscure are eliminated, by reference to the statements of entrymen in final proof. The use of the final proof is requisite to an intelligible statement and a complete understanding of what the defendants did; and the motion was evidently urged, not because the aid thus afforded to the narrative is immaterial, but because of its peculiar and especially detrimental materiality.

The particular materiality which inspires this objection lies in the fact that many of the entrymen swore falsely as to various matters in their final

proof. Such falsehood relates not only to the fact that they had, before making proof, sold or bargained to sell their lands, but to other matters as well, such as the manner in which they had obtained money to pay for the land, how long they had had their money, the extent and sources of their current income, and similar things, all bearing more or less directly upon the good faith of the proceeding.

If this falsehood in the final proofs is really immaterial, then it does not at all concern the defendants. If the fact that the entrymen, through whom the defendants claim, were guilty of fraud in obtaining their titles, has any possible tendency to prove fraudulent purpose or fraudulent practice on the part of the defendants, then that falsehood is highly material.

Some surprise would be caused by the proposition that the purchaser of a fraudulently acquired title could not be, in any case, affected by the known fraud of his vendor in acquiring the title. If these entries were made in fraud of the law, and the defendants bought, knowing that fact, counsel will not suggest that the fraud did not vitiate their titles. If the fact be that the defendants themselves, intending a fraud upon the law, caused the entries to be made in falsehood, it is preposterous to say that the fact of falsehood cannot be shown. Nor will it be even argued that falsehood on the part of the entrymen does not tend to prove fraudulent purpose on the part of those who procured the entries to be made, and, in any view of the case, the fact, that the entrymen secured

their titles by fraudulent means, would at least create a presumption of fraud against the defendants, which it would be incumbent upon the latter to rebut. In this instance, the defendants have felt themselves obliged to offer copious testimony to establish their own innocence an undertaking which would have been wholly unnecessary unless the very proof now pronounced immaterial had warranted inferences against the defendants which they were advised must be defeated.

One of the material averments of bill is to the effect, that the defendants conspired to obtain titles from the United States by fraud, falsehood, deceit and imposition upon the land officers, and that the titles were actually obtained by such means.

The obviously proper method to prove this averment is to produce the final proofs and to show that they contain falsehoods. If the proofs cannot be used for this purpose, the fact alleged is impossible of proof. To say that the falsehoods embodied in the final proofs are immaterial is to say that no such averment can ever be proved, and that every fraud upon the United States effected by means of false proof is necessarily unsusceptible of correction.

Counsel, being of course indisposed to go the length of this absurdity, will limit their objection to that particular falsehood in the final proofs whereby the entrymen denied that they had previously sold or agreed to sell the lands, that being the particular fraud which was held in the Williamson decision to be immaterial in that particular case. But this is

not an objection to the final proof as a whole, but only to a single and comparatively unimportant statement embedded in a mass of other statements, all equally false. At any rate, the objection would be available only as against the particular unauthorized statement, if anyone think it worth while to descend into such particularity in such a mass of falsehood.

Williamson vs. United States, 207 U. S., 424, was an indictment for conspiracy to commit subordination of perjury. In that case it was held that a given paper did not prove perjury in another paper. That is a very different thing from saying that the same paper may not in another case and upon a different issue tend to prove something else.

To say that false swearing, when proof of swearing is not required by law, does not constitute perjury, falls far short of saying that the same false swearing may not amount to deceit, and constitute a fraudulent means of effecting a fraudulent purpose. So far as the present bill proceeds upon averments of perjury in the final proofs, if there are such averments in the bill, it may be conceded that the false statements at final proof as to alienation do not tend to prove those averments, and that is as far as the *Williamson* case can touch the present cause. But so far as the bill alleges fraud, fraudulent purpose, the use of fraudulent means, misrepresentations, imposition upon the land officers, and the obtaining of titles by falsehood, deception, deceit and fraud, which facts are the gravamen of the bill, the false

swearing at final proof is plainly competent to prove such averments, and is palpably material to the issue presented.

THE FINAL PROOFS.

The admission of final proofs was objected to on the ground that they were incompetent, irrelevant and immaterial.

The objection to the final proof papers, which is obviously in the mind of moving counsel, is the ruling in the Williamson case, *supra*, to the effect, as assumed, that the admission of such papers is erroneous. Conceding, for immediate purposes of argument, that this is a correct understanding of the proceeding referred to, it will be observed that the language of the decision relates, not to final proof generally, or even to the competency of final proof in that particular case, but to certain affidavits offered as a part of the final proof in that case, but which the Court held were not properly required as final proof. The matter held objectionable was not the statutory final proof, but matter which in the decision itself is adjudicated not to be final proof at all. If, therefore, the authority of the Williamson case is relied upon to support this branch of the motion, the motion must be limited to any portion of the papers here put in evidence as final proof, which portion is no more than the affidavit which in that case was held incompetent to prove the issue in that case. Beyond these affidavits the Williamson decision does not go, even for the purposes of the precise

question before the Court.

The statements held in the Williamson case to be beyond the power of the general land office to require at proof related to the applicant's alienation of the land intermediate his application and his proof. In the entries involved in the present case statements as to this fact were taken by the local officers as part of the final proof, and in connection with the claimant's testimony concerning other matters which also were part of the final proof. The statute requires final proof to be made, and prescribes that it shall cover certain designated matters, of which the alienation of the land before the date of proof is not one.

Therefore it is respectfully submitted that the decree of the Circuit Court should be reversed and that the cause be remanded to that Court with instructions to enter a decree to the effect that the patents issued to the several entrymen named in the bill of complaint with the exception of those issued to Downs, William F. Snow, Hamilton, Koppas, Bates, O'Farrell, Gary and James O. Baker (as to which it is conceded the evidence does not justify a cancellation of the patents) be avoided and cancelled.

PEYTON GORDON,

Special Assistant to the Attorney General.

A. B. JACKSON,

Special Assistant to the Attorney General.

Chronological Index of Letters and Exhibits offered in evidence by Defendants.

Dec. 10, 1900, Letter, Barber to Long, regarding lands to be held by Barber for Long.	4562
March 8, 1901, Deposits of Frank Steunenunberg.	2839
May 3, 1901, Long to Barber, Letter, regarding lands held by Barber for Long.	4563
Nov. 6, 1901, Kinkaid Agent account with First Nat'l. Bank	3180
Nov. 6, 1901, Kinkaid deposits in First Nat'l. Bank	2861
Nov. 12, 1901, Survey of 6-4 finished.	3009
Jan. 18, 1902, (should be 1903), Letter from Steunenunberg to Barber re. Scofield.	4517
Jan. 19, 1902, Letter, Steunenunberg to Barber, in re. Crooked River entries.	4509
Feb. 8, 1902, Letter, Steunenunberg to Campbell inquiring about "report on timber deal sent you from here last Sunday"	3859
Feb. 10, 1902, Agreement between Steunenunberg and Sweet	5319
Feb. 11, 1902, Letter, Steunenunberg to Campbell "I protected the timber deal in Boise yester- day"	3859
Feb. 17, 1902, Letter, Barber to Steunenunberg, covering 83 deeds running to A. E. Palmer. . . .	4520
Feb. 21, 1902, Letter, Palmer to Barber, Mailed you Steunenunberg report today.	4368
Feb. 22, 1902, Palmer to Barber, letter, \$30,000 worth of timber already bought under Steun- enberg plan, etc. Steunenunberg wants to be	

- carried for an interest, his assistance would be worth a great deal to you.....4369
- Feb. 26, 1902, Telegram, Barber to Palmer. Have Steunenberg come to Eau Claire, etc.....4370
- Feb. 27, 1902, Letter, Palmer to Barber. Steunenberg put \$7500 into this deal since I wrote you and Campbell let him have \$15,000 more..4371
- March, 1902, (?), Legal opinion signed by Roy P. Wilcox4835
- March 1, 1902, Telegram, Barber to Palmer. Let Steunenberg come here.....4371
- March 1, 1902, Telegram, Palmer to Barber. Steunenberg here (Spokane) to-morrow.....4372
- March 1, 1902, Telegram, Palmer to Barber. Steunenberg should leave here Sunday.....4373
- March 2, 1902, Letter, Palmer to Barber, introducing Steunenberg4373
- March 2, 1902, Letter, Palmer to Barber. Steunenberg leaves tonight for Eau Claire.....4374
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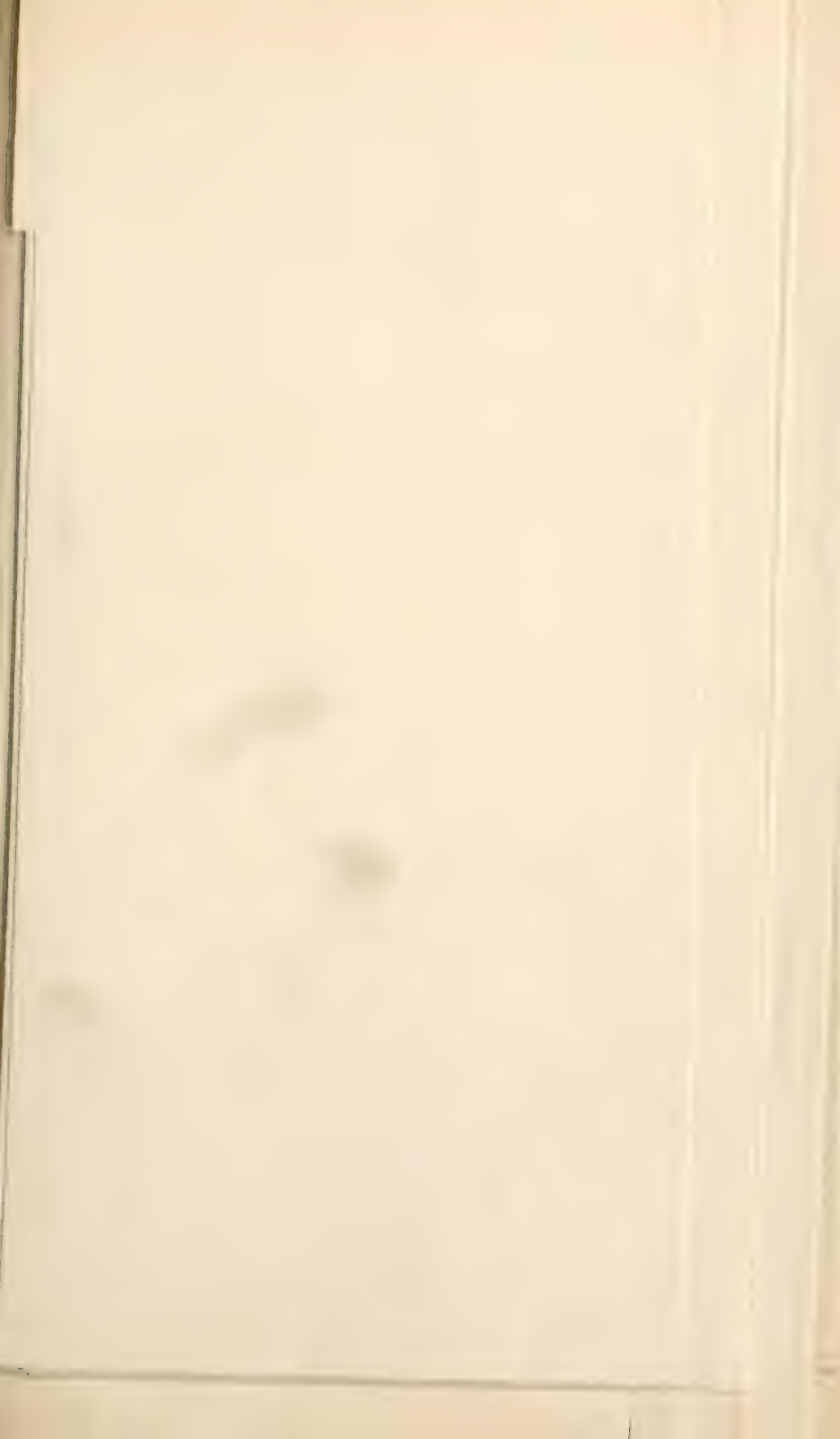
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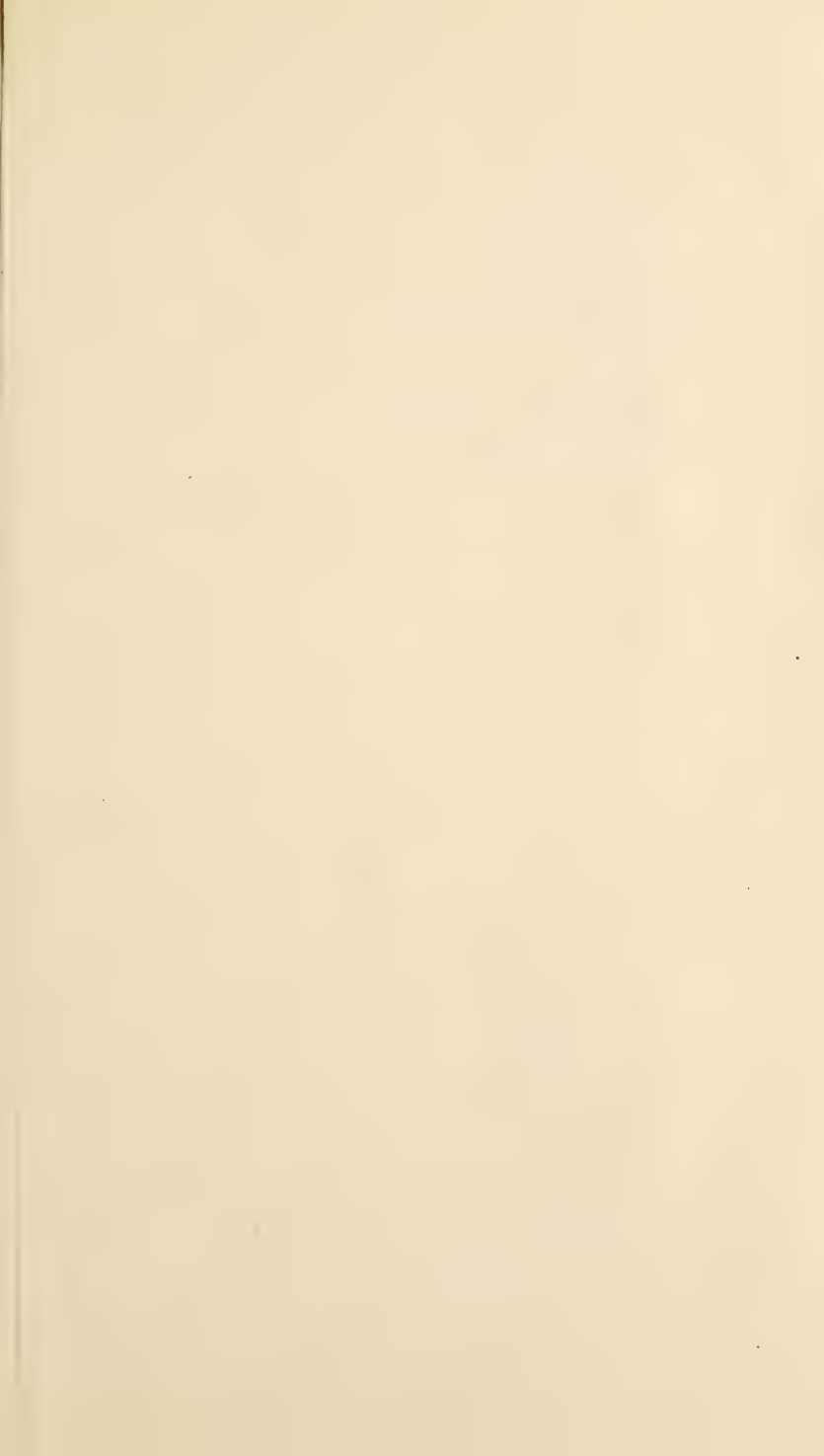




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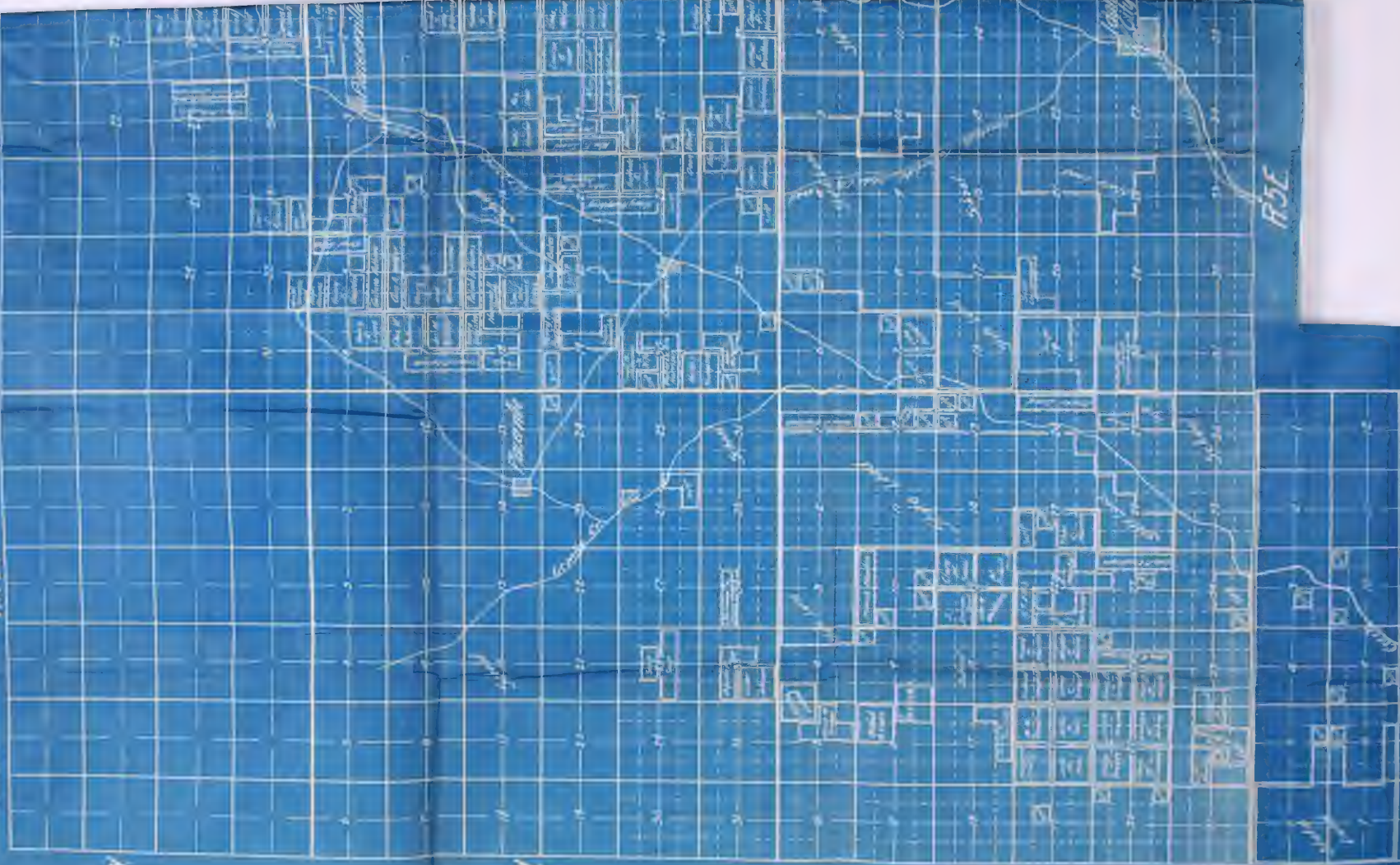
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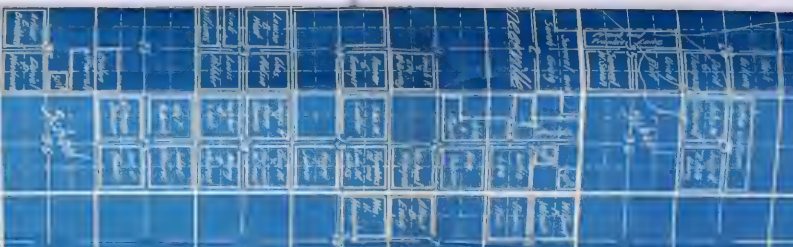
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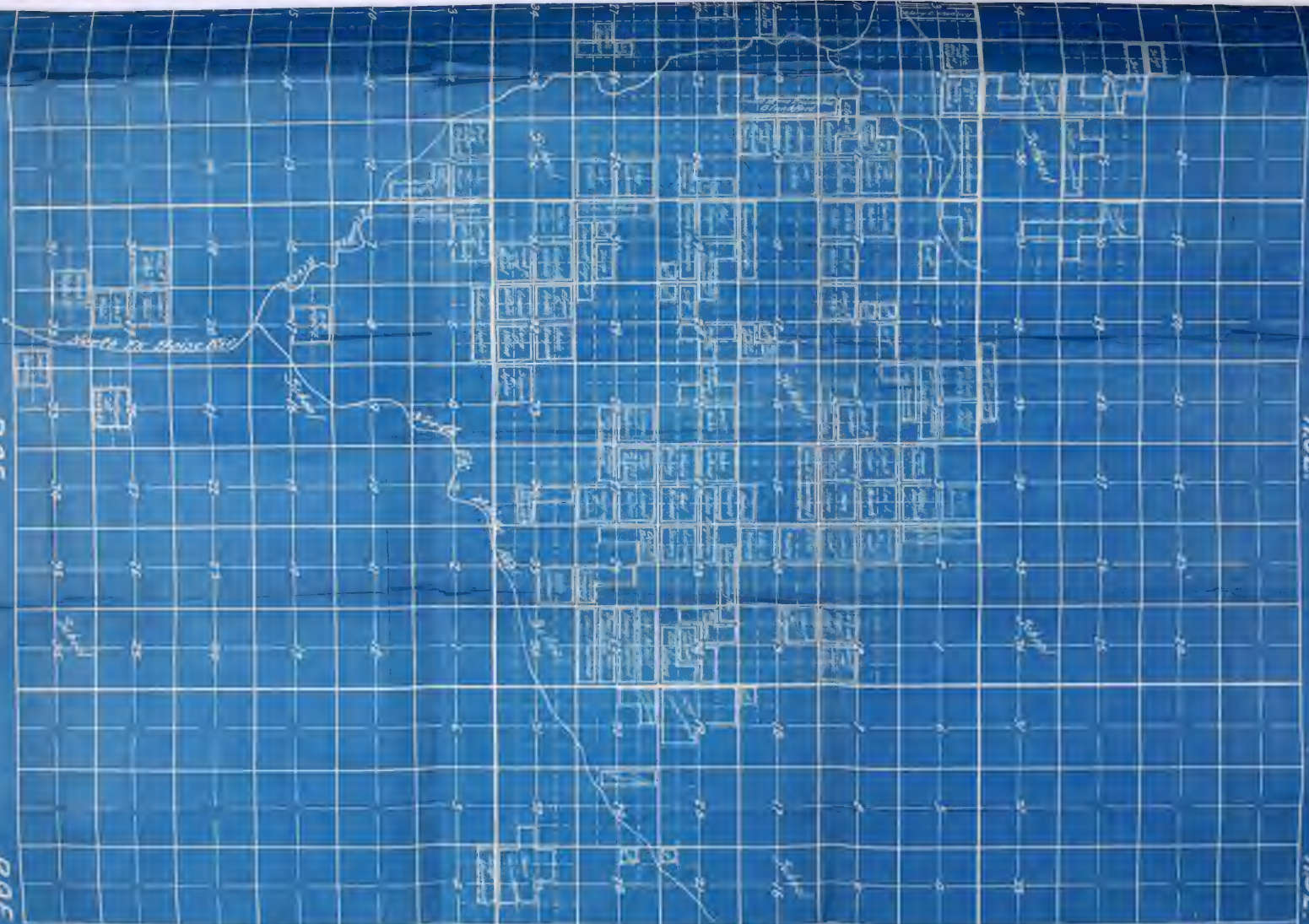
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No. 1883

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT:

February Term, 1911

THE UNITED STATES OF AMERICA,

Complainant, Appellant,

VS.

BARBER LUMBER COMPANY (a Corporation),
JAMES T. BARBER, SUMNER G. MOON, WILLIAM
SWEET, JOHN KINKAID, LOUIS M. PRITCHARD,
PATRICK H. DOWNS, ALBERT E. PALMER and
HORACE S. RAND,

Defendants,

BARBER LUMBER COMPANY,

Appellee.

Appeal from the United States Circuit Court of the District
of Idaho, Central Division.

Brief on Behalf of the Appellee



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HORACE S. RAND,

Defendants,
BARBER LUMBER COMPANY,
Appellee.

APPELLEE'S BRIEF.

STATEMENT OF CASE.

Under this heading, and in pretended compliance with Rule 24 of this court, counsel have devoted the first three hundred and thirty-six pages of their elaborate brief to presenting to this court a medley of isolated extracts from the evidence of about thirty of the one hundred and sixty witnesses who testified, intermixed with gratuitous, unwarranted and unsupported statements of fact, together with many pages of argumentative conclusions based upon such unreliable premises as, "it is reasonable to suppose;" "it can hardly be doubted;" "in the nature of things;" "would naturally

and easily account for;" "it is inconceivable," etc., and upon ingenuous mathematical computations by which both multiplier and multiplicand are first assumed and the product presented as conclusive evidence of counsel's legal conclusion.

This statement of the case is not only in violation of the rule of this court, as we construe it, but is so utterly unreliable, misleading and unfair, by reason of the ingenuous interpolation of argument with evidence, so arranged as to convey the idea that the argumentative portion is a part of the evidence to which citation is made, that we feel it our duty to the court, as well as to our cause, to present, as concisely as may be, in view of the voluminous record: first, the issues made by the pleadings; and second, a statement of the important facts which are established, either by stipulation of the parties, or by the undisputed evidence received on the trial, leaving the inference and conclusion to be drawn from such facts to be discussed under the portion of this brief containing our argument; and third, the result and decree of the trial court.

Nature of Action and Issues Involved.

This is an action brought by the Government, praying for judgment that two hundred and ten patents issued to the entrymen named in the bill be declared void and set aside and the lands embraced therein restored to the public domain.

ALLEGATIONS OF BILL. The allegations of the bill are contained in nine paragraphs as follows:

1. This paragraph charges that complainant was the owner of the lands therein described, and then proceeds to set out the provisions of the Timber and Stone Act, so-called.

2. That the General Land Office, pursuant to authority vested in it by the Timber and Stone Act, prescribed and promulgated certain regulations, including certain questions to be asked entrymen at the time of making final proof, which questions are set forth in detail.

3. That the defendant Barber Lumber Company and others, intending to defraud complainant, did combine, confederate and agree together and with Frank Steunenberg, deceased, John I. Wells and others, and did devise a plan whereby, unlawfully and fraudulently, by means of fraud, perjury and subornation of perjury and other unlawful methods, they might unlawfully and fraudulently procure for themselves and their use, benefit and pecuniary advantage, large quantities of said public lands; and then proceeds to set out in detail the fraudulent means agreed upon, which were—

(a) By procuring persons to avail themselves of the provisions of the Timber and Stone Act, by filing the written statement required by said Act, and doing the other things required, under the agreement with the defendant and others, by which said defendant and others agreed to purchase said lands described in the respective statements as soon as applicant should secure title thereto.

(b) That in other instances said unlawful means consisted in procuring persons to avail themselves of the provisions of said Act under an agreement with the defendant and others by which the defendant and others agreed to furnish or procure to be furnished and supplied to said applicant the amount of money necessary to pay all expenses in connection with making said filing and procuring title to said lands under said Act, including the sum necessary to pay for said land; whereupon said applicant, as soon as he should obtain title, was to deed his land to this defendant and others.

(Note. This paragraph is strictly a statement of the alleged means agreed upon, and not of acts done pursuant to it.)

4. The bill then alleges that, pursuant to said conspiracy and agreement, and to effect the object and purposes thereof, this defendant and others unlawfully, falsely, fraudulently and corruptly induced two hundred and ten entrymen, who are named therein, to apply at the land office, under the Timber and Stone Act, and did cause, induce and procure said parties, and each of them, to make and subscribe the written statement required by said Act of persons desiring to avail themselves of the provisions thereof, and to state therein that the applicant did not apply to purchase the land described in his statement for speculation, but in good faith, and to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title he might acquire from the Government of the Unit-

ed States might inure, in whole or in part, to the benefit of any person except himself.

That thereafter, pursuant to said unlawful conspiracy and agreement, and to carry out and effect the object thereof, this defendant and others induced and procured the entrymen named to appear before the Land Office and answer certain questions, being the questions prescribed by the Commissioner of the General Land Office, and alleges that each of said persons, by the procurement of this defendant and others, did answer said questions in effect that he had not sold or transferred his claim to the land for which he made application to purchase since making his sworn statement; that he had not directly or indirectly made any agreement with any person by which the title he might acquire from the Government might inure, in whole or in part, to the benefit of any persons except himself; and that he made his entry in good faith for the appropriation of the land exclusively to his own use, and that no other person, firm, corporation or association had any interest in the entry he was making, or in the land, or in the timber thereon, and that he paid, out of his own individual funds, all the expenses in connection with making said filing, and that he expected to pay for the land with his own money.

(Note. This allegation is the important one in the bill, and is the only one alleging unlawful or fraudulent conduct on the part of this defendant, or anyone else. The allegation therein contained, that this defendant induced and persuaded these two hundred and ten entrymen to make their filing and final proof, is the only

charge in the complaint tending to show fraud on the part of this defendant, and presents the one single issue involved in this action.)

5. It is then alleged that the statements made by each of the two hundred and ten entrymen, both at the time of making their original filing and at the time of making their final proof, were false, and were known by the entrymen and by this defendant and others to be false at the time they were made, and then proceeds, "that in truth and in fact divers of said several applicants had been supplied and furnished the money with which to pay for said lands and fees and expenses incident to obtaining title thereto by this defendant and others; and the title to said lands was so obtained by each of the several persons named as applicants for the purpose of, and with the understanding that the same should be conveyed, at the request of the defendants, as soon as title should be obtained from the United States.

6. This paragraph contains conclusions of law only, in alleging that by means of the scheme and process set forth this defendant defrauded the complainant, and that the patents issued thereon were void.

7. That the patents described were issued within six years of the filing of the bill.

8. That this defendant and others induced the entrymen named to convey the lands acquired by them to Albert E. Palmer, Geo. S. Long and Horace S. Rand, pursuant to the unlawful agreement thereinbefore set forth.

9. The ninth paragraph consists of a description of

the lands alleged to have been fraudulently procured, with the name of the person to whom such patents were issued.

ANSWER. The answer of the defendant Barber Lumber Company, (the only defendant served) admits the allegations of paragraphs 1, 2 and 7. It denies the existence of any conspiracy on the part of this defendant, or that it induced or persuaded any person to enter land under the Timber and Stone Act, or induced any person to testify falsely before the Land Office or elsewhere, and denies that it, alone, or in connection with any other person, did any act or procured any act to be done in violation of the laws of the United States, and denies that the patents issued to the persons named in said bill were issued illegally or procured by means of the fraudulent process therein set forth.

Further answering said bill of complaint, the defendant denies that it, at any time, entered into, or was a party to any agreement, combination, confederation or conspiracy with the other defendants, or with any or all of the persons named in the bill of complaint, having for its object to defraud the complainant of any of its public lands, and denies that it, at any time, did any act, or procured any act to be done, or knew of any act being done by any of the parties named in the bill of complaint pursuant to any agreement, confederation or conspiracy to defraud the United States in any manner.

Further answering, and as a separate defense, the defendant alleges, that it purchased the lands described in the bill which are named in the schedule thereto attached, for a valuable consideration, which consideration

was paid by the defendant without knowledge or notice of any defect in the title, or with any knowledge or notice that the laws of the United States had not been, in all things, complied with, and without knowledge or notice of any claim on the part of complainant to that effect. That relying upon the final receipt issued by the Government prior to the time each such tract was purchased, this defendant has expended large sums in the erection and construction of sawmills and manufacturing plant for the manufacture of the timber located on said land. That complainant, for more than two years after the issuance of said patents, took no action to set the same aside, or call the same into question in any manner, notwithstanding its officers were well aware of the facts relative to the entry of said lands and concerning the title thereto.

Under these pleadings the one issue and the only issue involved is

“Did the defendant Barber Lumber Company, pursuant to a conspiracy with the entrymen and others, induce and procure these entrymen to exercise their respective rights under the Timber and Stone Act for the benefit of the Barber Lumber Company, under an agreement entered into at or prior to the time they made their original filing, to which it was a party, by which the title they might acquire was to be transferred and turned over to defendant?”

Character of Complainant's Evidence.

The evidence was taken before special examiners without power or authority to limit the examination within legal rules. As a result, all limitations as to the admissibility or competency of evidence was disregarded. The voluminous record here presented resembles a "sweat-box examination" by a special agent, more than the legal trial of an issue of law or fact by a court of justice. To all this evidence defendant strenuously objected, and on the submission of the cause to the court moved to strike out as incompetent, irrelevant and immaterial substantially all of the government's evidence (pp. 5641 to 5665).

As illustrative of the character of the evidence relied upon by the Government in the trial court, and in this court, we select at random the following:

(a) Each entryman was questioned with reference to his or her evidence before the land office at the time of making final proof, particularly with reference to the questions formulated by the Department, and which the United States Supreme Court, in *United States v. Williamson* and *United States v. Biggs*, held to be wholly immaterial and improper; and then, in each instance, the evidence of such entryman before the land office at the time of making final proof, was offered in evidence against defendant's objection (pp. 140-141).

(b) A large amount of evidence, documentary and otherwise, relative to entries made by Arthur Anderson,

Harvey Wells, James T. Ball, Abel T. Hunter and Albert Nugent was offered and received, against defendant's objection that the lands entered by said entrymen were not involved in this action and this defendant acquired no lands by, through or under any of said entrymen whose entries were cancelled and never went to patent.

(c) L. L. Sharp, a special agent of the Department of Interior, was permitted to testify relating to protests filed with the Department, and with reference to reports made by him to the Department, without producing or explaining the absence of such protests and reports. This same witness was permitted to testify as to conversations had by him with the register of the local land office and other employees of the Government (pp. 1022-1130).

(d) Arthur Anderson was called by the Government, and thereafter witnesses Botcher and Ponchia were called for the purpose of impeaching him. Substantially one half of the evidence offered by complainant was for the purpose of impeaching the other half.

(e) A large amount of evidence, consisting of type-written statements, purporting to be made to the United States District Attorney out of court, by various witnesses who were called by the Government, were read into the record, which statements are now referred to as evidence in this case (pp. 1273-1276-1283; 1649-1653; 1876; 1923-1931; 1944-1952; 2217; 2277; 2751-2757 and many other instances).

(f) Witness Junius Wright, called for the Government, was permitted to testify to a long conversation

had with John I. Wells in 1905, after all the patents involved in this action had been issued (pp. 3565-3570).

(g) Many opinions and decisions rendered by the local land office at Boise, Commissioner of the General Land Office and Secretary of the Interior, in the matter of entries not embraced in the complaint in this action, were offered and received against defendant's objection (pp. 3257; 3337-3369).

(h) A large amount of correspondence between the local land office and the Department at Washington, relating to entries not mentioned in the complaint herein, were received (p. 3369).

(i) Several conversations between plaintiff's witness Sharp and plaintiff's witnesses Foster and Campbell, and other conversations between said witnesses Foster and Campbell, were offered and received by the Government, without any evidence that the defendant or any of its officials were present or participating (pp. 1033; 1035).

(j) Almost every entryman was permitted to testify to conversations between himself and his neighbors and others not parties to this action, and in this manner a large amount of saloon and back-yard gossip and street-corner discussion has been injected into this record. For instance: William Abrams testified to conversation with his neighbor Ballentine (135); Louis K. Burns testified to conversation with plaintiff's witness West (160); West testified to a conversation between himself and one Nelson (209); Ballentine testified to a conversation between himself and Nelson (227); plaintiff's witness Brisban testified to conversation with his

neighbor Rice (287); plaintiff's witness Nibler testified to a conversation between himself and one Link, a bartender in a saloon (312); the plaintiff's witness Samuel Gregg testified to a conversation between himself and one Pearson (362); plaintiff's witness Sarah Gregg testified to a conversation with her husband, Samuel Gregg (384); plaintiff's witness Blevin testified to a long conversation between himself and plaintiff's witness Rice (393); plaintiff's witness Mack Gillum tells us what plaintiff's witness William Pearson told him (407); plaintiff's witness Keene tells us what Dean West and Oral Dye told him (533); plaintiff's witness Benjamin Allen testified to a conversation between himself and one Thompson (573) and an agreement he, Allen, made with one Humphrey (401); plaintiff's witness James testified to a conversation he had with one McDonald (602); Margaret Pearson is permitted to testify to a conversation between herself and her husband, William Pearson (629); Willis C. Lane testified to a talk between himself and his brother (641); plaintiff's witness George T. Ellis states a conversation between himself and one Joseph Belk (719); plaintiff's witness Walter Harrison purports to state a conversation between himself and one Dean West, (760); Louis M. Folsom testified to a talk he had with one Jack Nelson (952); plaintiff's witness John T. Morrison testified to a conversation with one Calvin Cobb (1107); Mary Link testified at length to what her husband told her about the entry of timber lands (1153); and many others of similar character.

(k) A vast amount of so-called evidence, which is

referred to and relied upon by counsel in their brief in this court, will be found on investigation to consist of what is referred to on the trial as "sweat-box statements," taken by special agents, United States district attorneys and assistants from some of the witnesses called by the Government out of court and for use before grand juries and on other trials.

(l) During the trial at Boise, the daily press reported the progress, and some of the evidence now relied upon is such newspaper reports, to establish which the Government called as a witness one Max Taylor, a reporter of a daily paper (pp. 3233-3241).

(m) Government's witness E. E. Garrett, formerly Register of the Land Office at Boise, and who approved a certificate for patent for every entry involved in this action, was permitted, against defendant's objection, to testify to conversations between himself and Government's Special Agent Sharp (3222), with George M. Parsons (3336) and Hon. W. E. Borah (3012), and with many other people not in any manner connected with, or representatives of the defendant, and among other things was permitted to testify that, in his opinion, Inspector Sharp changed his attitude with reference to these claims after he returned from a visit to Portland (p. 3221).

The foregoing fairly illustrates the character of the testimony upon which the complainant relies. A motion of defendant to strike out this evidence (pp. 5641 to 5665) cites, in many instances, the page of record on which the particular evidence will be found. These pages refer to the page of record in the trial court, and

not the page of record on this appeal. The evidence, however, will be found by referring to the evidence of the witness named in each paragraph. The defendant hereby renews each and every objection made during the trial, and renews its motion above referred to.

Result In Trial Court.

The cause coming on to be heard on the evidence thus taken, the court held: (a) that it was unnecessary to consider the objections of defendant to the competency and materiality of the evidence, for the reason that it did not affect the conclusions arrived at, whether such evidence was competent or otherwise, and (b) that the averments of the bill were not sustained by the evidence, and that it should be dismissed. (See opinion, pp. 5678 to 5712.)

A decree was accordingly entered dismissing the bill (p. 5710), and from this decree complainant has appealed to this court, urging that the court erred in dismissing the bill and in refusing to enter a decree in accordance with the prayer of the complaint.

Leading Facts.

The following leading and controlling facts, are es-

tablished, either by stipulation of the parties, or by undisputed evidence. It is believed that the entire record fails to present a single instance where the evidence of one witness is met or disputed by any competent evidence of another witness. Most of these facts were specifically found by the trial court, and all of them will be verified by reference to the pages of record cited.

I.

The lands embraced in this action consist of three different tracts, purchased by defendant at different times, under different arrangements, and known as "Basin Lands," "Crooked River Lands" and "Six-Four Lands."

E. E. Garret, pp. 2979-2980.

Kinkaid, pp. 4264, 4278, 4288.

Wells, p. 4095.

Opinion Trial Court, 5683.

II

Basin Lands, so called, comprised townships 6, 7 and 8, in ranges 4, 5 and 6. Crooked River Lands comprised townships 6 and 7, in ranges 7 and 8; and Six-Four Lands consisted of township 6, range 4.

E. E. Garret, pp. 2979-2980.

Opinion trial court, p. 5683.

III

The Basin Lands were opened to entry at the following dates, towit:

T. 6, R. 5, on Aug. 1, 1874.

T. 6, R. 6, on March 28, 1896.

T. 7, R. 4, on Aug. 1, 1874.

T. 7, R. 5, on Aug. 9, 1897.

T. 7, R. 6, on Aug. 9, 1897.

Crooked River Lands were opened to entry as follows:

T. 6, R. 7, on April 19, 1897.

T. 6, R. 8, on April 19, 1897.

T. 7, R. 7, on April 19, 1897.

T. 7, R. 8, on March 28, 1897.

Six-Four Lands were opened to entry by the public on September 14th, 1903, after the State's sixty-day preferential right expired.

See stipulation, p. 3111 and 3010.

IV.

No entries were made in Boise Basin until the summer of 1901, when N. M. Ruick, E. E. Garret, the receiver of the Boise Land Office, and others, organized a railway company and filed the plat of a survey of a railroad from Boise up into the Basin.

For date of location see list, p. 3294.

John I. Wells, p. 4072 to 4074.

Homer Granger, p. 1434.

E. E. Garret, p. 3014 and 3048.

Opinion trial court, p. 5683.

V.

During the summer of 1901, Paris & Manning, a firm of locators residing in Minneapolis, Minnesota, advertised in the Minneapolis papers that they were prepared to locate Timber and Stone entrymen on desirable timber lands in Boise Basin in Idaho, and through such advertisements Patrick H. Downs, Henry Snow and two women came from Minneapolis and made the initial entries of the so-called Basin lands on August 17th, 1901.

P. H. Downs, p. 4007.

Henry Snow, p. 3906.

Opinion trial court, p. 5683.

VI.

Downs and Snow were practical cruisers and timbermen, and while waiting to prove up on their claims were employed by Mr. Manning, of the firm of Paris & Manning, to cruise the lands in Boise Basin, estimate the timber, run out the lines, etc. After working in that capacity for several days without being paid for their services, they concluded to begin locating on their own account.

P. H. Downs, p. 4007.

Henry A. Snow, p. 3906.

Opinion trial court, p. 5684.

VII.

During the latter part of September, 1901, John I. Wells, a miner, residing at Centerville, prompted by the talk of a railroad into the Basin, had procured a copy of the Timber and Stone Act, and had filed on a claim for himself, and had located several entrymen, viz., Jennie E. Wells, his wife; Albert Nugent; Arthur Anderson; Harvey Wells, his brother; Jas. T. Ball and Able Edward Hunter, all friends and neighbors, residing in the vicinity of Centerville, receiving a location fee of \$25 from each.

John I. Wells, p. 4073 to 4077 and 4137.

Arthur Anderson, pp. 2588 to 2611.

Albert Nugent, pp. 2634 to 2664.

VIII.

About this time, October 1st, 1901, Wells and Downs concluded to, and did, form a co-partnership in

the locating business, Wells going to Boise to solicit business and Downs doing the cruising, estimating and guiding entrymen to lands, which were open to entry. For a short time Henry Snow was a partner, the locating fee of \$25 being divided between the three, until Snow proved up on his claim in October, 1901, when he returned to Minneapolis. Thereafter Downs and Wells continued the business.

P. H. Downs, pp. 4010-13; 4027.

Wells, p. 4075.

Opinion trial court, p. 5684.

IX.

During August, September, October, November and December, 1901, and January, 1902, forty-nine locations were made in the Basin, of lands included in this action by the firm of Wells and Downs, exclusive of those located by Wells alone in September, and exclusive of the filing of Downs, Snow and the women who came with them through the firm of Paris & Manning.

See classification of entries.

See list of entries, pp. 3295 to 3299.

X

On July 13th, 1901, and before any filings had been made in the Boise Basin, a general order had been issued by the Commissioner of the General Land Office, suspending action on all Timber and Stone entries in Idaho, and elsewhere, and requiring all filing and final proof papers to be sent to Washington for approval before the issuance of final receipt or certificate. Until this order was vacated by order of June 6th, 1902, no final receipt was issued when final proof was made, but a

temporary receipt for the purchase price was given each entryman, and his testimony and that of his witnesses was taken and sent to Washington for approval. Entrymen were not advised of this order at time of filing.

See letter of July 13, 1901, p. 2976.

Garret, pp. 2977 and 2980-81; 3024-3244-3245.

Opinion trial court, p. 5685.

XI.

The first entrymen in the Boise Basin to tender their final proofs (except Downs and Snow) were the five persons who had paid John I. Wells \$25 each to be located, viz., Albert Nugent, Arthur Anderson, Harvey Wells, Edward Able Hunter and John T. Ball, on December 10th, 1901. They paid in the purchase price and made their final proofs, and temporary receipts were issued to them and their proofs sent to the Department for approval. When the time came to make their final proofs, Anderson and Nugent had spent their money, or most of it, and Wells first advanced them enough to enable them to pay for their land, and after final proof had been made, but before final receipt issued, he purchased their claims for \$650 each, paying them enough to make \$550 and agreeing to pay the remaining \$100 when a patent should issue. Their two entries, together with the entry of Ball, Hunter and Harvey Wells, were afterwards cancelled by the Department, and they never acquired the lands they filed upon.

Wells, p. 4078.

Albert P. Nugent, cross-exam., pp. 2664 and 2715.

Arthur Anderson, cross-exam., pp. 2611 and 2632.

XII.

About this time other final proofs were due to be made by entrymen whom Wells and Downs had located, and many of them had concluded not to pay for the lands they had filed upon, due to the fact that much was being said in the papers about land frauds in Oregon, that many placer miners were protesting against the allowance of Timer and Stone claims in the Basin, claiming the lands were mineral, and Karl Paine, the District Attorney Boise County, was advising that they had no right to make a Timber and Stone claim with a view of selling it.

Wells, pp. 4079, 4081, 4082, 4083.

Homer Granger, p. 1434.

John Kinkaid, p. 4233.

XIII.

Fearing that a failure on the part of those who had filed to prove up and perfect their titles would make it impossible to procure others to file, and thus destroy the profitable locating business he and Mr. Downs had established, Mr. Wells made an arrangement with one William Sweet, on or about December 25th, 1901, whereby Sweet undertook to furnish Mr. Wells the money to loan such of the entrymen who had filed as were unable or unwilling to pay for their lands, hoping thereby to be in a position to buy it later if he desired to do so.

Wells, pp. 4082 to 4086; pp. 4154, 4090, 4173.

Kinkaid, p. 4234.

Opinion of trial court, p. 5685.

XIV.

Pursuant to this arrangement, Mr. Sweet did furnish to Wells, and Wells loaned to the entrymen named in Class B, some or all of the money used by them in making final proof, aggregating about \$12,000, taking in most cases the temporary receipt issued by the land office as security.

Wells, p. 4150 and 4168.

Evidence of entrymen, Class B.

XV.

After Sweet had begun advancing money to Wells and many final proofs had been made (but not approved), and about January 1st, 1902, he employed defendant John Kinkaid to purchase these claims for him and gave him certain sums of money for that purpose. While Kinkaid was so employed he discovered that no final receipts had been issued and advised Mr. Sweet that he could not safely buy on the temporary receipts. About February 10th, 1902, Mr. Sweet formed a partnership with Gov. Steunenberg to buy lands, and Kinkaid continued his attempts to buy good titles for the firm of Sweet and Steunenberg until about April 1st, 1902, when he returned every dollar which had been given him for that purpose, without having purchased a single claim, and on April 16th, 1902, he left Boise for Thunder Mountain, intending to remain there permanently.

John Kinkaid, pp. 4241 to 4256. See pp. 4253-54-57.

Steunenberg-Sweet contract, Plff's. Ex. 146 B. p. 3007.

Opinion trial court, p. 5685.

XVI.

Almost immediately after Governor Steunenberg became interested in the venture of assembling a tract of timber land in the Basin, he began looking about for financial assistance, and attempted to interest his friend, A. B. Campbell, of Spokane, who loaned him \$15,000, and took under consideration a proposition to finance the scheme.

Steunenberg-Campbell correspondence, pp. 3854, 3859, 3868.

Opinion trial court, p. 5685.

XVII.

While Campbell was considering he met A. E. Palmer, of Spokane, who formerly was employed by the North Western Lumber Company, of Eau Claire, with which the defendants Barber and Moon were actively interested, and who had been requested by Messrs. Barber and Moon to report to them any good timber propositions he might hear of in the west. As Mr. Campbell was not a lumberman, and not desirous of going into a business he was not familiar with, he told Mr. Palmer of the Steunenberg proposition, and offered to turn it over to him, giving him at the time Mr. Steunenberg's report on the timber.

A. B. Campbell, pp. 3849, 3882.

J. T. Barber, pp. 4360, 4361.

Opinion trial court, p. 5686.

XVIII.

On February 21st, 1902, Mr. Palmer sent this written report to Mr. Barber, at Eau Claire, and the day following wrote him that \$30,000 worth of timber had al-

ready been bought by Gov. Steunenberg. As a result Mr. Barber directed Palmer to have Steunenberg come to Eau Claire at his expense, and on March 6th, 1902, Gov. Steunenberg arrived in Eau Claire with a letter of introduction from Palmer, dated March 2nd, 1902.

J. T. Barber, pp. 4367 to 4370-71-72-73-74, inclusive.

Opinion trial court, p. 5686.

XIX.

Gov. Steunenberg represented, among other things, that he and Mr. Sweet had already bought 6,400 acres of land, for which they had final receipts; that they would get deeds when patent issued, and that they had kept back a part of the purchase price until deed was issued; that a great many Timber and Stone entries had been made on which final receipt had not issued, but that he was confident he would be able to purchase them at not to exceed \$5 per acre when they were on the market. He further stated that enough more land could be procured by the use of scrip to make a total of 25,000 acres. That Sweet was not able to furnish enough money to assemble a large tract, but was willing to sell out, and solicited Mr. Barber and Moon to buy out Sweet's interest.

J. T. Barber, pp. 4374 to 4377 and 4403.

Moon, p. 4452.

Steunenberg contract, p. 4389.

Opinion trial court, p. 5686.

XX.

As a result of Gov. Steunenberg's visit to Eau Claire, and the representations he made, the terms of an agree-

ment were decided upon, by which the Sweet interest was to be transferred and assigned to Messrs. Barber and Moon, provided Mr. Palmer, after investigation, found the representations made to be correct. This contract was drawn up by Mr. Frawley, attorney for Messrs. Barber and Moon, dated March 12th, 1902, and signed by Barber and Moon on that date, and then sent to Palmer, with instructions to have Steunenberg sign if he found things as represented.

- J. T. Barber, pp. 4377-4379.
- Steunenberg contract, p. 4389.
- Palmer's instructions, p. 4415.
- .. Opinion trial court, p. 5687.

XXI

On April 2nd, Mr. Palmer went to Boise, looked over the timber in Boise Basin, with reference to its character and location, and on April 2nd, 1902, reported adversely on the proposition because of the inability to drive the logs by water and the enormous expense of building a railroad to it, and recommended buying the timber on Payette River instead.

Moon, p. 4424.

XXII.

Mr. Moon then wired that if the requisite amount of timber of proper kind could be had in the Basin, they preferred that to the Payette River, whereupon Mr. Palmer advised that he could close the deal, provided they understood that no patents were issued and that the title would be based upon Receiver's receipt; assuming that "Receiver's Receipt" meant final receipt, Mr. Moon

wired him to close the deal if he considered title good and everything seemed straight.

Moon, pp. 4427 to 4435.

XXIII.

On April 10th, 1902, Mr. Palmer closed the deal for the purchase of Sweet's interest in behalf of Mason, Barber and Moon, and drew his own checks for substantially \$40,000 to Sweet and Steinenberg, drawing on Barber and Moon for the amount. Thereupon, the contract dated March 12th, 1902, was signed by Steinenberg, and Barber and Moon first became interested in the purchase of Basin Lands.

Moon, pp. 4435-6-7-8.

Sweet assignment, p. 4442.

Opinion trial court, p. 5689.

XXIV.

On this date, April 10th, 1902, no filings had been made in Crooked River tract—Six-Four was not yet open to entry, and of the 92 Basin entries involved in this action, 74 applications had then been made, of which 50 had gone to final proof, including that of N. H. Young, made April 14th. The purchase price of these 50 claims had been fully paid to the Government, but temporary receipts only had been issued, which latter fact was not known either to Mr. Palmer or Barber and Moon. Of the 18 Basin entries made or filed after April 10th, 9 belong to Class A, 1 to Class C, 5 to Class E, and 3 to Class F.

See classification of entries.

Moon, *supra*, pp. 4438-9 and 4667.

J. T. Barber, pp. 4479, 4663.

See Palmer's letters, pp. 4427 to 4435.

Garret, p. 3245.

See for list of subsequent filings, App., to Classification.

Opinion trial court, p. 5689.

XXV.

Prior to this date, April 10th, 1902, advancements had been made by John I. Wells to the nineteen entrymen named in Class B, to enable them to make final proof; but this fact was not communicated to or known by either Mr. Barber or Mr. Moon.

Barber, pp. 4479, 4663.

Moon, pp. 4461, 4666.

XXVI.

On June 6th, 1902, the general suspension order of July 13, 1901, was, in effect, vacated, and the local offices were directed to issue final receipts and certificates on all suspended entries not in the hands of special agents, and accordingly final receipts were issued on every one of the 50 suspended entries which are involved in this action, as follows: During June, 1902, 3; July, 29; August, 12; September, 2; October, 1; and November, 1. (Two having previously been issued in May.) Non-alienation affidavits were taken by local land office from each entryman, and the special agent in charge was consulted by land office officials before issuing final receipt on these suspended entries. After June 6th, final receipt and certificate was issued when final proof was made.

See classification.

See letter, June 6th, p. 2998.

Garret, pp. 3244 and 3217.

Opinion trial court, p. 5690.

XXVII.

As soon as final receipts began to issue, the first one being to one Jno. Keane, on April 25th, 1902, Governor Steunenberg wrote that it was not necessary to wait for patents; that final receipts were sufficient; and later sent to Barber and Moon an opinion of Hon. W. E. Borah to that effect. In June, 1902, he began taking deeds on final receipts, and delivering same to Mr. Palmer under his contract.

Moon, pp. 4453 to 4458.

See also pp. 4474 and 4476.

Borah opinion, p. 4481.

Palmer a-c, p. 4463.

Opinion trial court, p. 5690.

XXVIII.

After John Kinkaid returned from Thunder Mountain, and after the order of June 6th, directing the issuance of final receipts, Gov. Steunenberg entered into a contract with him whereby Gov. Steunenberg undertook to pay him \$800 for each deed and final receipt he might procure embracing timber lands of the character described in his contract with Barber and Moon. Upon delivery of such deeds and final receipts by Kinkaid, Gov. Steunenberg paid him, and Gov. Steunenberg was reimbursed in like manner by Mr. Palmer, acting for Barber and Moon, upon delivery of such deeds.

Kinkaid, pp. 4261 to 4264. See pp. 4267-4271.

Steunenberg Bank a-c, June 7, 1902, p. 2843.

Palmer a-c, pp. 3955, 2860, 4463.

Palmer drafts on Barber and Moon, p. 4463.

Opinion trial court, p. 5690.

XXIX.

After making this arrangement with Governor Steunenberg, Mr. Kinkaid employed L. M. Pritchard, in June, 1902, to make purchase of all claims offered for sale upon which final receipt had been issued.

Pritchard, pp. 4187 to 4197.

Kinkaid, pp. 4265 to 4269-4272.

XXX.

Under this arrangement Mr. Palmer paid to Gov. Steunenberg the following amounts during the following months:

June, 1902, \$20,000.

July, 1902, 15,000.

Aug., 1902, 5,000.

Oct., 1902, 5,000.

Dec., 1902, 6,000.

Palmer a-c, p. 4463.

XXXI.

In December, 1902, Mr. Palmer removed to Canada, where he has since resided, and is now confined in a sanitarium as insane. He did not act after that date in the purchase of the lands, all payment were afterwards made to Gov. Steunenberg directly from Eau Claire.

Final proofs were made and final receipt issued in every Basin entry during the year 1902, except those of Oliver Johnson, C. M. Ballentine and D. G. Thompson, issued in January and February, 1903. This closed the entry of lands in the Basin which are involved in this action, with the exception of eight entries made during the

years, 1904, 1905, and 1906, and which were purchased by the Barber Lumber Company from entrymen; and the claim of M. Letta Eagleson, upon which final proof was made 3-17-04.

Cosgrove, p. 4589.

Moon, pp. 4459-4460-4478.

Classification.

Watson, p. 4054.

XXXII.

On July 9th, 1902, Messrs. Barber and Moon and others organized defendant Barber Lumber Company, which, on July 23, 1902, bought from Barber and Moon the Steunenberg contract, paying them all they had advanced under it, with interest, amounting to \$68,853.99, and assuming their obligations under it.

Moon, pp. 4669-4670.

XXXIII.

The Barber Lumber Company was originally organized with a capital stock of \$150,000, and has since been increased, from time to time. There are now outstanding 13, 955 shares, of par value of \$1,395,500, held by many new stockholders who became such since patents were issued to the land involved in this action.

Deft's. Ex. B., pp. 4672-4673-4674.

Deft's. Ex. C., pp. 4675.

Moon, p. 4671.

XXXIV.

Immediately after making the contract with Gov. Steunenberg, Messrs. Barber and Moon began trying to purchase suitable scrip to enable the Government to carry out his contract to acquire 25,000 acres in the

Boise Basin, and on Aug. 15th, 1902, the Barber Lumber Company had on hand 6,000 acres of Forest Reserve lien scrip, for which they had paid \$32,100 or \$5.35 per acre.

J. T. Barber, pp. 4397 to 4410.

Moon, pp. 4093, 4452, 4614.

See ledger a-c. Scrip Land, pp. 4486 and 4771.

Opinion trial court, p. 5700.

XXXV.

About September 1st, 1902, Mr. Barber was in Boise, and while there was informed by Gov. Steunenberg that there was considerable good timber which might be acquired by scrip in what is known as Crooked River country, and was directed by Mr. Barber to have it looked over with that in view. Gov. Steunenberg accordingly employed Mr. W. H. Taylor to go into that country and report on the amount and character of the timber. Mr. Taylor went up in October, 1902, and while there learned that Mr. Pat Downs had located a large number of Timber and Stone entrymen in that locality, and on the identical land he was directed to cruise. He then returned and made report to Gov. Steunenberg of what he had found, under date of December 5th, 1902. Gov. Steunenberg immediately went to Eau Claire, and reported that the attempt to lay scrip had failed, and also reported that final proof was being made on the Timber and Stone entries, and that the entrymen had put the sale of their claims in the hands of John Kinkaid, and that through Kinkaid he thought they could be bought for \$1,000 per claim. He was thereupon authorized to have Mr. Taylor look it over, see that the

timber was as claimed, and if it was, to negotiate for its purchase. From that time until February 11th, these negotiations were pending between Gov. Steunenberg and Kinkaid, when the deal was closed by Steunenberg agreeing to pay \$950 per claim, and on that day Gov-Steunenberg drew on Barber Lumber Company for \$20,000, and deposited it to the credit of F. Steunenberg, Agent, in the bank at Caldwell. This was the first money furnished for this purpose, and the beginning of his agency account.

J. T. Barber, pp. 4502 to 4537.

Taylor report, p. 4504.

Stipulation of Bank a-c., Steunenberg, Agent, p. 2846.

Ledger, a-c., Steunenberg, pp. 4527, 4528.

Kinkaid, pp. 4278 to 4284.

Opinion trial court, p. 5694-5-6.

XXXVI.

During the month of February, 1903, \$45,000 was furnished to F. Steunenberg as agent; during March, 1903, \$20,000; during April, \$10,000; all to purchase Crooked River claims. Final proofs were made on the Crooked River entries involved in this action as follows:

November, 1902, 2.

December, 1902, 23.

January, 1903, 21.

February, 1903, 12.

March, 1903, 12.

April, 1903, 2.

May, 1903, 5.

July, 1903, 2.

August, 1903, 1.

October, 1903, 8.

November, 1903, 4.

Of the 92 Crooked River entries described in the complaint, all had been filed upon prior to February 11, 1903, except fourteen, which were filed upon during the spring of 1903, after which no further lands were entered in that section. The purchase of these claims during the summer of 1903, closed the Crooked River transactions, and the defendant still had on hand 6,000 acres of scrip it had not been able to place.

Ledger a-c. Steunenberg, p. 5220.

Stipulation of deposits, p. 2842.

Classification.

Opinion trial court, p. 5695.

XXXVII.

Like the Basin entries, all the entrymen paid Wells and Downs \$25 apiece to be located, which fee included procuring their papers to be made out, instructions as to filing, etc. Downs stayed in the timber, while Wells collected the fee, arranged the parties who desired to locate, etc.

Wells, pp. 4077 and 4099.

Downs, pp. 4011 to 4023.

See evidence of every entryman.

XXXVIII.

On September 14th, 1903, town six, range four, was opened to entry, the state's sixty-day preference having expired on Saturday, September 12th, and it having filed its selections on that date. The scrip in Steunenberg's possession was intended to be used to take up

what desirable lands the state did not take. It was in the name of S. G. Moon, and during the week prior to September 14th, Gov. Steunenberg employed Atty. J. J. Blake to prepare the necessary papers to use this scrip, and under his direction sent for duplicate power of attorney to be used in filing.

Garret, p. 2969.

J. J. Blake, pp. 4035-7-8.

J. T. Barber, pp. 4543, 4544 and 4550.

Moon, pp. 4550 to 4560.

Kinkaid, p. 4291.

Opinion trial court, p. 5698.

XXXIX.

Patrick Downs, having located all the available and desirable claims elsewhere, and knowing the intention to scrip this T. 6, R. 4, employed John Kinkaid to ascertain, if he could, what lands the state was going to select before such selections were filed. Mr. Kinkaid went to the office of State Land Board and got the descriptions, which the State had decided to take, and turned them over to Downs several days before September 14th. With this information Downs begun locating the many applicants he had for Timber and Stone claims, and located about 27 on Friday and Saturday, September 11th and 12th. These entrymen, knowing of the proposed use of scrip, and to prevent such use, stood in line the night of September 13th, and were on hand to make their respective filings when the office opened in the morning. Because of the necessity for accuracy and speed, Mr. Downs employed Mr. Kinkaid to make out all the filing papers for these entrymen.

Wells was not interested in these locations and received no part of the location fee, which each one paid to Downs. By reason of the action of Downs in forming the line-up, Steunenberg was again unable to place the scrip, and the lands went to the entrymen in due course.

Wells, pp. 4100 to 4102.

Kinkaid, pp. 4288 to 4297.

Downs, pp. 4014 to 4019.

F. L. Martin, p. 2483.

Opinion trial court, p. 5699.

XL.

All the Six-Four entries involved in this action went to final proof, and final certificates were issued during the month of December, 1903. After final receipts began to issue, Steunenberg made another arrangement with Kinkaid similar to the first one, agreeing to pay him \$800 for each deed and final receipt he should procure covering lands of the character required. Kinkaid commenced buying these claims under this arrangement in December, 1903, and defendant sent the following funds to Steunenberg for that purpose at the following dates:

December 24, 1903, \$12,600.

January, 30, 1904, 6,600.

March 3, 1904, 10,000.

These claims were all purchased during December, 1903, and January, February and March, 1904, and the transaction closed.

See classification as to entries.

Kinkaid, pp. 4297 to 4301.

J. T. Barber, pp. 4564 to 4572.

See ledger a-c. Steunenberg, pp. 4600 and 4610.

See letter re-funds, Dec. 4, p. 4701.

See letter, p. 4570.

XLI.

The Barber Lumber Company paid \$800 each for all the claims in Boise Basin and Six-Four, and \$950 each for all the claims in Crooked River, except in a very few instances, when it paid more than the above figures. Kinkaid paid from \$650 to \$750 for the Basin and Six-Four claims, and \$800 for those in Crooked River.

See a-c. F. Steunenberg, pp. 4600 to 4610.

Kinkaid, pp. 4269-4283 and 4300.

XLII.

By an arrangement between Governor Steunenberg and Kinkaid, the profit Kinkaid was making in Basin entries was held back by Steunenberg until completion, and the profit of \$150 per claim he was making on Crooked River was paid to him and then divided between them with the understanding that Gov. Steunenberg would repay it sometime in the future. At the time of Gov. Steunenberg's death he still owed Kinkaid a part of his profit on Basin purchases, and had not repaid this one-half of the profits made on Crooked River purchases.

Kinkaid, pp. 4322 to 4326, 4269 and 4276-77.

XLIII.

The lands purchased in the Basin prior to 1904, and which are involved in this action, were deeded by entrymen to A. E. Palmer; those in Crooked River to H. S. Rand, a stockholder in the company, except that of Aaron Ownbey to Steunenberg and that of Jens Olson

and John W. Rose, deeded to Palmer; and those in Six-Four to Geo. S. Long. During 1905, at different times, these gentlemen deeded to Barber Lumber Company, which deeds were recorded; and all lands afterwards acquired were taken directly to the Company. The lands purchased by defendant for millsite purposes in 1904 were also taken in the name of Rand and others. The purpose of not taking title direct from entrymen to company was to prevent knowledge of the fact that a large company was buying for operating purposes, under a belief that such knowledge would inflate price.

Kinkaid, p. 4270.

Deeds, pp. 3347 to 3366.

Barber pp. 4489, 4562 to 4565, 4797.

Haines, p. 3274.

Rand correspondence, p. 2917.

Moon, p. 4474.

Chapman, p. 3989.

XLIV.

Beginning in 1904, the complainant issued patents to all the lands embraced in Bill of Complaint, which patents are issued only after each entry has been approved by officers of the local land office and special agents on the ground.

E. E. Garret, pp. 2996, 2597-3000-3004-3022 and 3218.

Report on Nobler claim, pp. 3369 to 3371.

Patents in evidence.

XLV.

At the time these final certificates were issued, the Land Department was refusing to issue final certificates.

to any entryman, when it appeared by his final proof that he had, subsequent to the making of his application, and prior to final proof, either encumbered or agreed to sell his land.

E. E. Garret, pp. 3019-3020.

XLVI.

The defendant has constructed a large and expensive manufacturing plant at a cost of for the manufacture of the timber in question. The defendant has acquired and now owns substantially 60,000 acres of land based on Timber and Stone entries, of which 33,600 are involved in this action.

Chapman, pp. 3990 and 3991.

Ledger a-c. mill property.

XLVII.

During the entire period covered by the transactions alleged in the complaint, neither Barber nor Moon knew any of the entrymen, Kinkaid, Pritchard, Wells, Downs, Sweet or Martin, and had no correspondence or other transactions with them relative to these or any other lands. They were entire strangers to each other.

Barber, pp. 4362 to 4366 and 4478.

Moon, pp. 4412 and 4413.

Wells, p. 4084.

Pritchard, p. 4186.

Kinkaid,

Opinion trial court, p. 5706 and p. 5690.

XLVIII.

Neither Wells nor Downs were acting for anyone but the entrymen in making locations, and had no interest in the purchase or sale of the claims they located,

except to collect their location fee, with this one exception: After Steunenberg, acting for Sweet, had sold out his interest to Barber and Moon, and had himself made a contract with them, and had induced them to believe that the \$22,000 Sweet had invested was in the purchase of final receipts, he arranged with Wells, who had advanced most of this money to certain of the entrymen, to see to its collection, and to do this Wells urged or encouraged each such entrymen to sell to Kin-kaid, for whom Mr. Pritchard was acting, and at the time of such sale Wells made the collection, retained something for the use of the money, and returned the balance to Steunenberg.

Downs, pp. 4014 and 4015.

Wells, pp. 4077, 4085, 4088, 4093 to 4095.

Opinion trial court, p. 5695.

XLIX.

After April 10th, 1902, when Barber and Moon bought out Sweet's interest, not a dollar of their money was advanced by way of loan or otherwise to any entrymen.

Wells, p. 4089.

See Palmer a-c., p. 4463.

Barber, 4663.

Moon, 4667.

L.

In addition to the money sent Gov. Steunenberg for the purchase of timber lands, other large sums were trusted to him for the purchase of mill-site, etc. He did not render an account as desired, and in 1903 Barber and Moon began to insist on some accounting being

made. As a result, he rendered an account of his expenditures under the old Basin contract on October 5th, 1903, and an account of all other expenditures, on July 7th, 1903. Later, and in July, 1904, he came to Eau Claire, and while there attempted to account for the balance up to that date. He died leaving something over \$6,000 not accounted for, some of which has been found and some of which he appears to have used temporarily for his own purposes. These are the only accounts rendered to Barber and Moon or defendant showing the items of his disbursements in the company's business. In these accounts he credited himself with \$950 for each Crooked River claim purchased by him of and through Kinkaid, and \$800 or more for each Basin or 6-4 claim.

Steunenbergs statements, pp. 4600 to 4610.

Letters demanding statements, pp. 4589, 4596, 4598, 4615, 4616, 4617.

Moon, pp. 4599-4618-4620.

LI.

Every entryman whose land is involved in this action made his application to purchase without any agreement or arrangement of any kind by which any other person, firm or corporation acquired and interest in or lein upon the land he applied to buy, and every one paid his or her own location fee, expense of filing and advertising, and making the trip of more than fifty miles to view the land.

See evidence of every entryman.

Opinion trial court, pp. 5690-96-99.

LII.

Neither Barber nor Moon, nor any officer or agent of the defendant company, or anyone acting for or with them, ever suggested to any entryman that he testify falsely before the land office, or ever suggested that any entryman exercise his right under the Timber and Stone Act for his own or for another's benefit.

See evidence of every entryman.

Barber, pp. 4479, 4663-4.

Moon, pp. 4667-8.

LIII.

All entries were made and paid for as shown by the following "Classification of Entries," which refers to the page of record where the evidence of each entryman will be found.

(Note. This classification can be assumed by this court to correctly show the important facts relative to each entry involved. It was duly served on counsel for complainant before argument, with a request that any errors in statement or classification be pointed out. No exception has been taken to it in trial court or in this.

See notice, p. 5640, and classification, p. 5665, etc.)

Classification of Entries Mentioned in Bill of Complaint.

Class A.

Basin	30	
Crooked River	62	
6-4	18	110

Class B.		19
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Class C.

Basin	3	
Crooked River	4	
6-4	2	9

Class D.		2
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Class E.		64
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Class F.		6
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Total entries involved		210
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Class "A".

It appears from the undisputed evidence that the following named entrymen and entrywomen, named in the bill of complaint, filed upon lands under the Timber and Stone Act under the date set opposite their respective names; that final proof was offered on the date shown, and approved, and final receipt issued at the date indicated, and that they respectively decided on the date shown by the appropriate column. In every case the entryman paid his own location, preliminary, and filing expense, and paid the Government for the land, without borrowing any portion of the funds necessary, or otherwise procuring the same from any of the defendants or alleged conspirators. Each testifies emphatically that at no time was he or she a party to any agreement, express, or implied, whereby any person, firm, or corporation had any interest in, or lien upon the land embraced in his or her entry, or upon the timber situate thereon, and that the allegations of the complaint, so far as his or her respective entry is concerned, are false.

BASIN ENTRIES.

Name.	Page.	Date of Fil'g.	Date of F. Rcpt.	Date of Deed	Remarks
Baker, J. O.....	498	12-24-01	3-20-02	7-22-02	7-7-04

Butler, Edw. E.....1592	3-28-02		6-24-02	6-19-03	Papers only in evidence.
Downs, P. H.....4007	8-17-01	11-13-01	7-26-02	8-27-04	
Ewing, Clara B.....2001	8-11-02		11-7-02	6-29-03	
Ewing, A. B.....3451	8-11-02		11-7-02	6-29-03	
Eagleson, M. Leta.....2546	1-2-04		3-17-04	5-23-04	
Folsom, Lewis L.....949	10-30-01	1-22-02	7-25-02	6-23-03	
Gillum, Mack406	12-26-01	3-18-02	7-29-02	7-31-02	
Gary, John R.....1672	12-19-01	3-7-02	7-18-02	3-20-03	
Humphrey, Henry3549	4-29-02		7-17-02	11-12-03	
Harrison, W. L.....759	11-26-01	2-12-02	9-5-02	9-12-02	
Hollister, J. M.....614	10-26-01	1-21-02	7-25-02	6-23-03	
Hollister, Leonora637	10-26-01	1-21-02	7-25-02	6-23-03	
Lane, Willis C.....640	3-25-02		6-18-02	4-20-03	
Lane, Frank3754	4-4-02		7-7-02	3-14-03	
McDonald, J. G.....934	5-4-02		8-7-02	8-9-02	
Monroe, John C.....1708	12-31-01	3-21-02	7-29-02	6-2-03	Papers only.
Monroe, Mary A.....1695	1-7-02	4-7-02	8-1-02	6-2-03	

Name.	Page.	Date of Fil'g.	Date of F. Prf.	Date of F. Rcpt.	Date of Deed	Remarks
Pritchard, L. M.....	4185	3-21-02		6-13-02	3-19-03	
Patterson, Chas.	986	3-28-02		6-24-02	3-27-03	
Snow, W. F.	3938	9-10-01	11-30-01	10-14-02	10-20-02	
Thurman, Frederick	707	3-26-02		6-19-02	7-5-02	Papers only.
Thompson, Jennie E.....	1617	8-12-02		11-11-02	3-23-03	
Walker, W. S.	1986	4-5-02		6-20-02	3-16-03	
Worthman, H. S.	429	4-5-02		6-19-02	3-16-03	
Young, Norman H.	1629	1-22-02	4-14-02	7-16-02	11-10-04	
Martin, Bertha	1768	1-25-05		4-13-05	5-1-05	
O'Ferral, Evelyn	2021	11-27-01	2-26-02	8-1-02	8-1-05	
Phelps, E. J.	976	3-6-05		5-13-05	7-28-05	
Thornton, Dennis	1400	1-27-06		4-5-06	5-7-06	
CROOKED RIVER ENTRIES.						
Austin, W. C.	3630	7-10-03		10-13-03	11-6-03	

Austin, Ada	3643	7-10-03	10-13-03	11-6-03	Did not testify.
Alexander, Caroline	891	10-7-02	2-12-03	2-16-03	
Anderson, Eloff	514	8-29-02	12-8-02	2-11-03	
Anderson, Emma	526	8-29-02	12-8-02	2-11-03	
Bayhouse, Frank	916	9-24-02	2-5-03	2-17-03	
Beckley, C. R.....	3472	10-3-02	2-12-03	2-13-03	
Beckley, Mantie	3462	10-3-02	2-12-03	2-13-03	
Bayhouse, Geo.	896	9-24-02	3-13-03	3-24-03	
Belk, J. F.....	1385	9-26-02	3-17-03	3-24-03	
Butler, Louisa E.....	1807	9-15-02	1-8-03	2-12-03	
Bliven, C. C.....	393	9-16-02	4-29-03	4-30-03	
Butler, Elvie M.....	1796	9-15-02	1-8-03	2-12-03	
Bilderbeck, Emma G....	840	7-24-02	1-28-03	2-12-03	
Bayhouse, Alfred	1043	9-15-02	1-19-03	2-12-03	
Bayhouse, Henry	1162	9-15-02	1-9-03	2-12-03	
Butler, G. W.....	1852	9-23-02	5-4-03	5-16-03	
Bayhouse, Deliah	1214	9-24-02	1-28-03	2-12-03	
Cooper, Jeanette B.....	1304	10-17-02	2-18-03	2-20-03	

Name.	Page.	Date of Fil'g.	Date of F. Prf.	Date of F. Rcpt.	Date of Deed	Remarks
Ellis, Geo. T.....	718	9-19-02		1-22-03	2-13-03	
Eagleson, D. C.....	1748	9-19-02		1-21-03	2-16-03	
Eagleson, Harry K.....	998	9-19-02		1-29-03	2-16-03	
Eagleson, Helen E.....	1056	10-7-02		2-12-03	2-16-03	
Eagleson, C. H.....	1732	9-19-02		1-29-03	2-16-03	
Fordney, Alice	1819	9-15-02		1-8-03	2-12-03	Now Alice Gregory.
Gardner, Elma E.....	2042	10-3-02		3-19-03	3-28-03	
Gibbard, W. H.....	476	8-29-02		12-3-02	2-12-03	
Gibbard, Addie G.....	489	9-8-02		12-23-02	2-12-03	
Hanson, Andrew	1497	9-16-02		1-15-03	2-12-03	
Hart, Fannie R.....	1728	9-9-02		12-22-02	3-12-03	
Hart, I. W.....	1710	9-9-02		12-22-02	3-12-03	
Joplin, Walter	1239	9-23-02		5-4-03	5-14-03	
Joplin, Sonora	1226	10-2-02		3-19-03	3-25-03	

Joplin, Andrew F.....	1890	10-2-02	3-19-03	3-25-03	
Kemper, A. R.....	1321	10-17-02	2-18-03	2-20-03	
Kingsley, C. S.....	682	9-11-02	12-22-02	3-12-03	
Kingsley, Caro F. B.....	698	9-11-02	12-22-02	3-12-03	
Martin, Henrietta	1430	9-29-02	3-18-03	3-24-03	
Martin, W. H.....	1416	9-29-02	3-18-03	3-24-03	
Neil, John M.....	357	9-15-02	12-17-02	2-11-03	
Neil, Maud B.....	358	9-15-02	12-17-02	2-11-03	Papers only.
Nusbaum, J. V.....	861	9-19-02	1-21-03	2-16-03	Papers only.
Nusbaum, Pearl I.....	851	10-7-02	2-14-03	2-16-03	
Ownbey, Mary E.....	1202	8-30-02	12-11-02	2-9-03	
Ownbey, Aaron	3828	9-6-02	12-18-02	1-27-03	
Ownbey, Jackson	1183	8-30-02	12-11-02	2-9-03	
Parker, B. T.....	2080	9-4-02	12-17-02	2-11-03	
Sensenig, E. S.....	737	9-19-02	1-21-03	2-16-03	
Sensenig, Lucretia	751	9-30-02	2-13-03	2-16-03	
Schmelzer, Elizabeth	808	10-3-02	2-16-03	2-25-03	
Stahl, Arietta	824	9-29-02	3-17-03	3-25-03	

Name.	Page.	Date of Fil'g.	Date of F. Prf.	Date of F. Rcpt.	Date of Deed	Remarks
Stahl, B. E.....	831	9-29-02		3-17-03	3-25-03	
Sullivan, Helen	1476	2-12-03		5-7-03	5-14-03	Papers only.
Sullivan, Joseph	1455	2-12-03		5-7-03	5-14-03	
Starn, E. H.....	791	9-6-02		12-18-02	2-18-03	
Starn, Mary	819	9-6-02		12-18-02	2-18-03	
Twogood, M. L.....	2095	9-13-02		1-14-03	2-12-03	
Twogood, Ida	2138	9-15-02		1-16-03	2-12-03	
Vance, S. E.....	1784	8-10-03		11-10-03	12-16-03	
Weasel, F. P.....	1252	4-22-03		7-13-03	7-31-03	
Youngkin, J. A.....	870	8-29-02		12-3-02	2-12-03	
Youngkin, Susie	968	9-8-02		3-24-03	3-28-03	

Note: Each of the entrymen and entrywomen in Class A testified personally to the facts above stated, except the following: Maud P. Neal, Frederick Thurman, J. V. Nusbaum, Helen Sullivan, John C. Monroe, and Ada V. Austin. The land office file of the entries of each of these persons was offered and received in connection with the evidence of their respective

husbands or wives, who testified at the page indicated to the other facts stated, showing each of them to belong to this class.

6-4 ENTRIES.

Davidson, W. B.....	2146	9-14-03	12-3-03	12-30-03
Ehrmantraut, Jos.	3893	9-14-03	12-15-03	12-24-03
Ehrmantraut, Mar't.	3885	9-14-03	12-15-03	12-24-03
Eagleson, Geo. G.....	2342	9-14-03	12-11-03	12-16-03
Eagleson, Mary J.....	2358	9-14-03	12-11-03	12-16-03
Farady, C. B.....	2234	9-14-03	12-17-03	2-13-04
Kinert, L. F.....	2160	9-14-03	12-23-03	3-3-04
Martin, T. L.....	2482	9-14-03	12-11-03	1-2-04
Martin, Frank R.....	2469	9-14-03	12-15-03	12-23-03
Martin, Wheeler H.....	2252	9-14-03	12-11-03	8-19-04
Noble, H. B.	3430	9-14-03	12-24-03	2-4-04
Penrod, Jos.	2429	9-14-03	12-17-03	3-28-04
Ross, W. A.....	2286	9-14-03	12-23-03	12-28-03
Ross, Josie M.....	2329	9-14-03	12-23-03	12-28-03

Name.	Page.	Date of Fil'g.	Date of F. Prf.	Date of F. Rcpt.	Date of Deed	Remarks
Reeves, Wilburt R.....	2441	9-14-03		12-17-03	2-29-04	
Snow, Cleora M.....	2456	9-14-03		12-24-03	1-15-04	Now Mrs. Wickersham.
Scully, Margaret	2526	9-14-03		12-10-03	2-1-04	
Woodburn, Jno. K.....	2112	9-14-03		12-2-03	10-24-04	

Class "B."

The following entries, made by the following persons, were all in the tract known as "The Boise Basin." Each of the entrymen and entrywomen testified to having paid his or her own funds for all preliminary expenses, including location fees paid to Wells & Downs, filing fees in land office, and cost of publication. Each one made final proof prior to April 10th, 1902, and each one borrowed some, or all of the funds used for that purpose, from John I. Wells. Each one testified that, at the time of making his or her original filing, he had not entered into any agreement of any kind, express or implied, by which any person, firm or corporation, had acquired any interest in, or lien upon the land embraced in his entry; and each one testified that at the

time of receiving the money from Mr. Wells, he entered into no agreement for the sale of his land, and had no conversation with anyone with reference to selling the same until final proof was allowed and final receipt issued. In each case final proof was taken and held up in the local land office for a considerable period of time, the local office reporting favorably on each entry at the time final proof was offered, and took from each a non-alienation affidavit before issuing final receipt and certificate. Each testified that his or her sworn statement, filed at the time of applying to purchase, was true; and each testified that the allegations of the complaint are false so far as his or her entry is concerned.

Name.	Page.	Date of Fil'g.	Date		Deed	Remarks
			Date of F. Prf.	Date of F. Rcpt.		
Abrams, William	134	10-30-01	1-22-02	7-15-02	7-16-02	
Ballentine, C. W.	227	10-29-01	1-22-02	7-16-03	8-31-03	
Burns, L. K.	159	11-26-01	2-14-02	6-24-02	9-18-02	
Brookheart, A. E.	3384	1-14-02	4-8-02	8-26-02	9-15-03	
Clyne, H. L.	2498	10-31-01	1-24-02	8-19-02	7-18-03	
Gillum, Altha	406	12-26-01	3-27-02	7-18-02	7-31-02	See Mack G.
Granger, Homer C.	1434	9-20-01	12-12-01	7-15-02	7-28-03	

Name.	Page.	Date. of Fil'g.	Date of F. Prf.	Date of F. Rcpt.	Date of Deed	Remarks
Greig, Samuel	362	12-7-01	2-21-02	7-1-02	5-24-03	
Greig, Sarah	384	12-7-01	2-21-02	7-1-02	5-24-03	
Link, G. A.	1136	11-1-01	1-29-02	7-22-02	6-19-03	
Link, Mary	1153	11-1-01	1-29-02	8-19-02	6-19-03	
Lee, Lelia	1961	12-19-01	3-6-02	7-18-02	3-26-03	Now Mrs. Butler
Nibler, Lewis	312	11-1-01	1-28-02	8-6-02	8-7-02	
Pierson, Margaret	628	12-7-01	2-21-02	6-19-02	3-23-03	
Pierson, Wm.	653	11-26-01	2-13-02	6-23-02	3-23-03	
Stephenson, Letta L.	3648	12-24-01	3-13-02	7-18-02	9-15-03	
Stephenson, M. L.	3675	12-24-01	3-14-02	7-18-02	9-15-03	
West, Dean	200	10-26-01	1-16-02	7-9-02	3-16-03	
West, Louisa	219	11-1-01	1-29-02	7-18-02	3-16-03	

Class "C."

The following-named entrymen and entrywomen borrowed some, or all of the money used by them in making final proof; which final proofs were made subsequent to April 10th, 1902. Some of the money was borrowed from John I. Wells, and some from John Kinkaid, and in one case from L. M. Pritchard. This list constitutes all of the entries in which final proof was made subsequent to April 10th, 1902, by means of money borrowed from any of the defendants or alleged conspirators. Each entryman testified to the effect that his sworn statement, filed at the time of making application, was true; and that neither at that time nor at the time of making final proof had he entered into any agreement, express or implied, with any person, by which any person, firm or corporation acquired any interest in, or lien upon the land he was applying to purchase, or the timber thereon. Each testified that the allegations of the complaint are false so far as his entry is concerned.

BASIN ENTRIES.

Name.	Page.	Date. of Fil'g.	Date of F. Prf.	Date of F. Rcpt.	Date of Deed	Remarks
Brisban, Edw.	287	4-18-02	7-8-02	7-9-02	7-12-02	

Name.	Page.	Date of Fil'g.	Date of F. Prf.	Date of F. Rcpt.	Date of Deed	Remarks
Hoover, Sedgwick	1529	3-25-02		6-18-02	7-14-02	
Wilmot, Ery	1262	3-22-02		6-12-02	6-24-03	
CROOKED RIVER.						
Hobbs, John E.	1331	8-10-03		11-10-03	12-17-03	
Thompson, Mary	1478	9-16-02		1-23-03	2-11-03	
McDonald, Frank R.	2053	9-16-02		4-28-03	5-4-03	
Lockhart, E. A.	1836	7-24-03		10-16-03	11-5-03	
6-4 ENTRIES.						
Ellis, A. T.	2405	9-14-03		12-11-03	1-4-04	
Harbaugh, R. J.	2178	9-14-03		12-7-03	1-6-04	

Class "D."

The following entries were made under arrangement between the entrymen and one Wm.

H. Humphrey, by which Humphrey agreed to furnish the necessary funds with which to procure title, after which the land was to be sold and the profits divided between the entrymen and Humphrey. The entryman, Thompson, did not testify, but his entry was embraced in the stipulation pursuant to which the entry papers of a large number of entrymen, not called, were introduced in evidence. Mr. Wm. H. Humphrey testified as to both of these entries, to the effect that the agreement was entirely between himself and the entrymen, and that none of the defendants were parties to it. Evidence establishes that the entries were made with the expectation of selling it, but no efforts were made to sell until after final receipt was issued.

Allen, Ben R. 572 8-10-03
 Thompson, D. G. 3506 11-5-02

11-6-03 2-9-04 C. R.
 2-25-03 3-6-03

(See stipulation Mar. 11, 1909, and evidence Wm. H. H.)

Class "E."

No evidence was introduced with reference to the lands acquired by the following named entrymen and entrywomen, except that by virtue of a stipulation made during the trial, March 11, 1909, the entry papers of each such entrymen and entrywomen were offered and received in evidence, from which it appears that they filed application to purchase, tendered their final proof,

received final receipt and certificate, and deeded at the times hereinafter set forth. In connection with the entry papers, patents issued to each such entrymen and entrywomen, were offered in evidence.

The following statement also shows the particular tract to which each entry belonged. The stipulation and entry papers, including patents, constitutes all that is before the Court with reference to these entries.

Name.	Tract.	Date of Fil'g.	Date of		Remarks
			F. Prf.	F. Rcpt.	
Allen, Homer G.....	Basin	3-22-02		6-12-02	6-13-02
Avery, Geo. R.....	6-4	9-14-03		12-16-03	12-24-03
Benedix, H. F.....	Basin	11-26-01	2-13-02	7-26-02	8-12-02
Barker, Smith	Basin	3-28-02		6-24-02	6-26-02
Brookheart, Adella	Basin	3-26-02		6-17-02	8-1-03
Byro, J. H.....	Basin	4-18-02		7-11-02	7-12-02
Bowen, S. C.....	Basin	3-17-02		6-23-02	10-30-02
Bush, E. E.	C. R.	9-24-02		5-4-03	5-15-03
Blandford, S. M.....	C. R.	10-3-02		2-10-03	2-12-03

Blandford, E. L.....C. R.	10-3-02		2-10-03	2-12-03
Briggs, Abbie M.....	6-4		9-20-04	9-29-04
Bates, John	Basin	1-13-02	8-2-02	3-17-06
Cassel, John M.....	Basin	3-7-02	11-5-02	3-19-03
Cutler, G. M.....	Basin	12-9-01	7-26-02	8-13-03
Campbell, A.	6-4		12-16-03	12-28-03
Clawson, C. W.....	6-4		12-15-03	12-24-03
Cavanaugh, W. E.....C. R.	9-14-02		12-26-02	2-11-03
Dockery, Eva H.....C. R.	9-15-02		12-20-02	2-11-03
Dockery, E. J.....C. R.	9-15-02		12-22-02	2-11-03
Ensworth, Geo. H.....	Basin		6-13-02	6-18-02
Eoff, Victoria L.....	Basin		10-25-04	9-2-05
Flint, Uriah	Basin	3-12-02	7-21-02	8-5-02
French, Joseph	Basin		6-20-02	7-9-03
French John D.....	Basin		6-20-02	6-25-03
Fisher, (Alma)	6-4		12-11-03	2-29-04
Glass, T. M.....	Basin	12-13-01	8-2-02	9-3-02
Hamilton, J. H.....	Basin	11-27-01	7-29-02	2-12-03

Name.	Tract.	Date of Fil'g.	Date of F. Prf.	Date of F. Rcpt.	Date of Deed	Remarks
Horner, S. S.....	C. R.	7-10-03		10-9-03	12-29-03	
Horner, Hortense	C. R.	7-10-03		10-9-03	12-29-03	
Harrington, E. A.....	C. R.	5-29-03		8-19-03	9-10-03	
Johnson, Oliver	Basin	9-25-02		1-29-03	6-17-03	
Judge, Wm.	Basin	3-25-02		6-18-02	6-28-02	
Jaycox, Luella	C. R.	7-20-03		10-16-03	12-31-03	
Jaycox, Orlin R.....	C. R.	7-20-03		10-16-03	12-31-03	
Kelly, T. F.....	C. R.	9-4-02		12-17-02	2-11-03	
Koppa, Michael	Basin	10-9-01	12-19-01	8-2-02	7-29-05	
Lewin, W. H.....	Basin	3-28-02		7-25-02	7-15-03	
Lewin, Gertrude	Basin	4-29-02		7-18-02	7-15-03	
Lake, Beulah	6-4	1-8-04		9-20-04	9-30-04	
McBurney, A. F.....	Basin	12-23-01	3-13-02	8-1-02	4-7-03	
Marcum, Sam	Basin	3-22-02		6-12-02	6-28-02	
Marcum, W. J.....	Basin	4-18-02		7-9-02	7-9-02	

Nickerson, F. B.....	Basin	10-19-01	4-7-02	5-5-02	6-3-03
Nelson, Chas.,	Basin	14-1-01	4-28-02	8-6-02	3-19-03
Noble, W. F.....	C. R.	9-25-02		1-29-03	2-13-03
Olson, Jens	C. R.	8-27-02		14-21-02	12-6-02
Ownbey, Harrison	C. R.	8-30-02		12-11-02	2-9-03
Ownbey, James	C. R.	8-30-02		12-11-02	2-13-03
Pawley, J. J.....	C. R.	8-10-03		14-10-03	11-21-03
Rose, Jno. W.....	C. R.	9-16-02		1-23-03	2-6-03
Rice, Henry	Basin	12-26-01	3-28-02	8-1-02	3-19-03
Roberts, W. F.....	Basin	12-24-01	3-20-02	7-18-02	3-17-03
Rothine, G. H.....	Basin	11-26-01	2-14-02	7-14-02	7-14-02
Resser, Burt	C. R.	7-24-03		10-16-03	11-4-03
Walker, C. A.....	Basin	12-7-01	2-20-02	7-18-02	8-12-02
Woodmore, D. P.....	Basin	3-24-02		6-17-02	3-23-03
Warren, G. S.....	Basin	8-11-02		11-11-02	3-23-03
Wilmot, W. F.....	Basin	12-26-01	3-19-02	7-18-02	6-24-03
Wilson, Lena D.....	C. R.	10-2-02		3-20-03	3-26-03
Wilson, W. L.....	C. R.	10-2-02		3-20-03	3-26-03

Name.	Tract.	Date of Fil'g.	Date of F. Prf.	Date of F. Rcpt.	Date of Deed	Remarks
Wilhite, G. F.....	C. R.	9-24-02		1-27-03	2-14-03	
Wilhite, Elizabeth	C. R.	9-24-02		1-27-03	2-14-03	
York, G. M.....	C. R.	4-22-03		7-20-03	7-31-03	
Kempner, H. M.....	C. R.	10-17-02		1-14-03	2-20-03	

Note: The stipulation above referred to, made March 11, 1909, during the trial of this action, included eighty-seven (87) entries. Subsequent to making the stipulation, a large number of the entrymen therein mentioned were found and testified, and they are not included in this classification. The stipulation also includes men and entrywomen who are named in the bill of complaint and not involved in this action, and they are also excluded. The above and foregoing list includes simply the names of entry a large number of entries not mentioned in the complaint and in the stipulation referred to, and who did not testify in this case. All names included in the stipulation, who did testify, and all whose entries are not involved in this action, are excluded from the above list.

Class "F."

No evidence was introduced, or stipulation made with reference to the following entries, which constitute all of the entries named in the bill of complaint not embraced in the foregoing classification. As to these entries, there is nothing before the Court but the allegations of the bill.

Name:

Blake, J. J.	Tract
Gardner, C. M.	Basin
Gardner, Alforata	Basin
Holcomb, A. S.	Basin
Thompson, Nellie J. Suspended entry.	Basin
Gardner, Nathan M., Suspended entry.	Basin

Appendix.

LIST OF BASIN ENTRYMEN WHO FILED AFTER
APRIL 10, 1902, SHOWING THEIR
CLASSIFICATION.

Name.	Class.
Brisbin, Ed.	C.
Byro, J. H.	E.
Blake, J. J.	F.
Ewing, Clara B.	A.
Ewing, A. B.	A.
Eagleson, M. Laeta	A.
Gardner, C. M.	F.
Humphrey, Henry	A.
Holcomb, A. S.	F.
Johnson, Oliver	E.
Lewin, Gertrude	E.
McDonald, J. G.	A.
Marcum, W. J.	E.
Martin, Bertha	A.
Phelps, E. J.	A.
Thompson, Jennie	A.
Thornton, Dennis	A.
Warren, G. S.	E.

ARGUMENT.**On the Facts.**

No argument is necessary to establish the foregoing facts. They are verities in this case, made so either by stipulation of the parties, or by the undisputed evidence of both parties and by the findings of the trial court. Any decree entered by this court must be one which can be supported by and be consistent with such leading facts. Counsel, in their brief, do not even assign as error the finding of such facts by the trial court, but urge only that the decree entered was erroneous. This contention is based upon the argument, that notwithstanding the undisputed evidence and stipulations of counsel, standing alone, would support the findings made by the trial court, the record contains evidence of "conditions and transactions," more or less remotely connected with or bearing upon the issues made by the pleadings in this case, which, unexplained, tend to dispute the facts thus established by the undisputed evidence and stipulations, and which it is claimed have not been satisfactorily explained by defendant. These "conditions and transactions" are the "badges of fraud" which are relied upon by complainant to warrant this court in finding that all of the witnesses for both complainant and defendant testified falsely in this trial; that the defendant and all of the witnesses called in its behalf and the counsel engaged in presenting its de-

fense are criminals and perjurers as well as frauds; that, as the defendant and its principal witnesses, who are co-defendants in this action, have been charged with defrauding the Government, their evidence is not worthy of credit; that the witnesses called by the Government to support the allegations of the bill relative to their respective entries, and who, in every instance, testified that such allegations were absolutely and unqualifiedly false, should not be believed, because, had they testified otherwise, it would have involved an admission of guilt on their part; that as all the evidence offered by both plaintiff and defendant is, for such reasons, rendered unreliable and incredible, the facts established by the undisputed evidence should not be controlling upon this court, and the decree to be entered should be based upon the inferences to be drawn from the alleged "badges of fraud" above referred to.

We contend (a) that such "conditions and transactions," even unexplained, would be insufficient to overcome the positive direct evidence of both parties to the contrary; and (b) that under the whole evidence in this case such conditions and transactions do not even create a suspicion of fraudulent conduct on the part of this defendant, or of any person acting for it, or for whom it was responsible.

We will discuss very briefly the evidence relative to each of the so-called "badges of fraud," and its bearing upon the issues made by the pleadings in this case:

(a) That the five "Anderson entries" were found to be fraudulent and canceled by the Government.

What are known as the "Anderson entries" in this litigation comprise entries made by Arthur Anderson, Albert T. Nugent, James T. Ball, Abel E. Hunter and Harvey H. Wells. (Appellant's brief, p. 79.) None of these entries are involved in this action. Each of their respective entries or first application to purchase was made on September 24th, 1901, and each made final proof on December 10th, 1901, on which date they paid the purchase price to the Government and received a temporary receipt. Each was located by John L. Wells, and each paid him a location fee of twenty-five dollars. As these entries were made, final proof offered and money paid to the government four months before Barber or Moon entered into their contract with Governor Steunenberg, seven months before this defendant was organized or thought of, and as each of these entrymen was subsequently defrauded by the Government out of the moneys he paid for his land and his entry canceled in conformity to the uniform ruling of the land office that an agreement to incumber or sell made subsequent to the original filing and before final proof vitiated the entry, the irrelevancy of the evidence bearing on these entries is apparent. The only apparent purpose for which these entries were dragged into the trial of this case was to create the impression that John L. Wells, whose firm subsequently located many of the entries involved, was representing this defendant, and procuring entries to be made in its behalf, as early as September, 1901. For this purpose, Arthur Anderson and Albert

T. Nugent were called by the Government, and testified, as did every other entryman called, that at the time of making their original applications to purchase they paid with their own money the locating fee to Wells, the land office and publication fees at Boise, and without a suggestion from anyone as to what they were to do with the land after they acquired it.

Arthur Anderson testified:

"I thought it would be a nice thing to acquire one hundred and sixty acres in my old age. At the time Wells spoke to me I was thinking of it for some time. I knew the piece of land I wanted, but was not familiar with the way to do the business. I agreed to pay Wells twenty-five dollars to attend to it for me, and paid him twenty dollars and owe him the balance. Four of my neighbors concluding to do the same thing, we hired a team, which I paid for myself, to take us to the land office. I paid the land office fees and filed on this land. At the time I made my filing I had entered into no agreement in writing or by word of mouth, express or implied, with Wells or with any other person or firm or corporation by which I had agreed to turn this land over to anybody after I got title. No one had suggested such an agreement to me. I intended to keep the land for my own benefit, to chop the wood on it, as I had every winter for years past. I was making plenty of money at that time in mining to make final proof." (2613-2660).

Albert T. Nugent testified:

"I paid Wells twenty dollars location fee, and he gave me the description of the land, which I took to Falks' store, at Boise. I came to Boise for the express purpose

of filing on this land. I paid my share of the team, and paid the land office, filing and publication fees with my own money. I had neither borrowed nor arranged with anybody for money at that time. I understood I would have to pay the locating fees and land office fees (2668). The first time I heard anything about selling out was about the time I made my final proof (2675-2676). Between the time I made my original entry and the time I came to make my final proof I have no recollection of seeing Wells (2697). When Sharp, the special agent, came to see me, he told me it was a crime for anybody to enter a timber and stone claim and sell out before final proof had been made, and if I had done such a thing I was liable under the law. He further stated that if I would come out and tell the exact facts, that I would be granted immunity from punishment (2679). I made the affidavit for Mr. Sharp (see appellant's brief, p. 84) under an agreement with him that the Government would not prosecute me, and that I would thereafter do whatever the Government wanted me to do in the matter of prosecuting these so-called timber frauds. Under this agreement I afterwards filed a sworn complaint against L. M. Pritchard, charging him with having defrauded the Government in these timber matters. At that time I did not know Mr. Pritchard, and do not know him now (2680). At the time I made my original filing, I expected to be able to dispose of the timber for enough to pay for all my expenses, and a substantial profit besides, and have the land left. That is what I expected and intended to do at the time I filed. This other plan of selling out to Wells, which was ultimately adopt-

ed was suggested to me after the time to prove up had about arrived, and I had not money with which to make final proof (2695). My evidence that I gave to Sharp, my evidence in the land office, and afterwards in the Borah trial and in this case, is on the assumption that I violated the law, because I sold out before final receipt and because of the promise of the Government of immunity" (2703).

While these two ignorant and misguided witnesses testified at different times to a different state of facts, influenced no doubt by a desire to earn the promised immunity for an imaginary crime which they were told they had committed in disposing of their lands, or agreeing to dispose of them before final receipt was issued, their whole evidence establishes beyond question that at the time they made their original filings, in September, 1901, they were neither promised nor knew of any prospective purchaser, but believed they would be able to sell the land, if they acquired it, to someone at a substantial profit, and, believing this, made their entries in perfect good faith. When the time for final proof arrived, Mr. Anderson had squandered the money set aside for that purpose, and Nugent was without funds. Mr. Wells at that time had established a thriving business as a timber locator, in connection with Downs, and, for the protection of his own business, made arrangements to purchase their lands, advancing them sufficient funds with which to make final proof. Under the ruling of the Department at that time, this was deemed fraudulent, and this entire proceeding, civil and criminal, as appears from the bill of complaint, is drawn on that theory.

Under that mistaken theory of the law, the entries of Nugent and Anderson were canceled, the money they had paid to the Government forfeited, and such illegal forfeiture constitutes the only tangible evidence of fraud developed by this immense record, and the Government is the guilty party.

(b) That Wells and Downs located substantially all of the entrymen whose entries are involved; that either Kinkaid or Pritchard purchased many of the tracts from the entrymen, and that all were ultimately deeded to the Barber Lumber Company.

These facts, in connection with the mistaken view of the law entertained by the Department of Justice, as well as the land office officials at the time this action was commenced, is responsible for this entire litigation. No doubt the Government has been defrauded in some instances by lumber companies and timber grabbers, colonizing their employees or others on a tract of timber for the purpose of making entries for the benefit of the company, and the fact that lands were located by one firm of locators, purchased by one real estate dealer, and deeded to one lumber company, might be sufficient to warrant a suspicion of concerted action, or even a legal investigation; but the suspicion of the prosecutor cannot become the findings of the court, unless the evidence warrants such findings, and in this case the evidence demonstrates to a mathematical certainty that such concerted action did not exist; that Wells and Downs

formed a partnership and entered into the business of locating entrymen on Boise Basin lands in October, 1901, long before Sweet became interested in assembling the tract; long before Governor Steunenberg joined with Sweet, which was in February, 1902; long before Messrs. Barber and Moon had their first conference with Governor Steunenberg relative to these lands, in March, 1902, and long before Barber and Moon finally entered into a contract with Governor Steunenberg, on April, 10th, 1902, after which date but eighteen entries were made in the Boise Basin.

These facts, established by the undisputed evidence, necessarily dispel any suspicion of concerted action, at least as to the Basin entries. It conclusively appears from the established facts hereinbefore referred to that Wells and Downs rushed entrymen into the "Crooked River tract" and "6-4 tract," so-called, for the express purpose of preventing the Barber Lumber Company from acquiring those lands by means of scrip. The interest of Wells and Downs, as locators, and whose livelihood depended upon the twenty-five dollar location fee paid them by each entryman, was directly adverse to that of the Barber Lumber Company, which had purchased scrip for the express purpose of acquiring these lands, by means of which they could have acquired them at a much less price than they were compelled to pay to the entrymen, whom Wells and Downs located.

The fact that Mr. Kinkaid negotiated with many, if not most of the entrymen, for the purchase of their lands, taking deeds in the name of Rand, Long or Palmer, who were, of course, acting for the Barber Lum-

ber Company, is of no greater significance, when viewed in the light of the evidence in this case. After Messrs. Barber and Moon had entered into a written contract with Governor Steunenberg, he employed Kinkaid to purchase Basin entries when the same were offered for sale, paying him eight hundred dollars for each quarter-section. Mr. Kinkaid's interest was in the profit he was making, he buying most of the Basin entries at the rate of six hundred and fifty dollars per claim. While acting under this contract, it became generally known that Mr. Kinkaid was buying timber claims, and naturally, when final proofs had been made in the "Crooked River" and "6-4" tracts, and the entrymen, after making several efforts, had failed to find another purchaser for the land, they went to Mr. Kinkaid, who, in turn, after much negotiation, sold them to Governor Steunenberg, then acting as agent of the Barber Lumber Company, for nine hundred and fifty dollars per claim, or a profit to himself of one hundred and fifty dollars. These claims cost the entrymen less than four hundred and fifty dollars apiece, including location fee and all expenses. They sold them at from six hundred and fifty dollars to eight hundred dollars per claim to Mr. Kinkaid, who, in turn, sold them at from eight hundred dollars to nine hundred and fifty dollars to Governor Steunenberg, acting either under contract with, or as agent for the Barber Lumber Company; and yet this court is seriously asked to find, by judicial determination, that the original entryman was the agent of the Barber Lumber Company in making his or her entry; that Wells and Downs were the agents of the company in locating the lands,

and that Kinkaid was the agent of the company in buying them, and that it was all pursuant to a conspiracy or agreement entered into before the original filing was made.

We commend to the court the frank, candid evidence of Mr. Patrick Downs, who testified in unequivocal terms to the effect that he was employed by no one but the entrymen or entrywomen he located; that he received no compensation from any other source; that he did not know Barber, Moon, Kinkaid, Pritchard, Steunenberg or anyone else in the transaction, and that he had no interest in what became of the lands, nor to whom they were sold, nor any interest in the location, except to earn and collect his fee of twenty-five dollars (4007-4034). Also the evidence to the same effect of John I. Wells (4096, 4275, 4287); of Messrs. Barber and Moon, to the effect that they never had any business relations, transactions or correspondence with either Wells, Downs, Pritchard, Kinkaid, or any of the entrymen or entrywomen; that they never solicited or requested any person to make a timber and stone entry, and that they never authorized anyone else to do so, and never knew or heard of an entryman being so solicited or requested.

As bearing on the inference to be drawn from the fact that the particular lands involved in this action were substantially all located by Wells and Downs, purchased by Kinkaid, and ultimately deeded to the Barber Lumber Company, it should be remembered that Wells and Downs were the only people in Boise or vicinity engaged in the business of locating, except the Minneapo-

his concern that started in August, 1901, and soon abandoned it; that Kinkaid was the only real estate man in the city engaged in the business of buying claims; and that the Barber Lumber Company was the only company in that vicinity who were trying to assemble a tract sufficiently large to warrant the erection of an expensive manufacturing plant. It should also be remembered that only about one-half of the lands acquired by the Barber Lumber Company, tributary to its mill, are involved in this action; that they paid substantially fifty thousand dollars for lands for a mill site (5248), and thereafter spent a much larger amount in erecting a mill.

Under these circumstances, it was natural that the Barber Lumber Company should desire to acquire all of the timber naturally tributary to its manufacturing plant, of which but a limited amount existed. After Mr. Kinkaid had entered into contracts with Mr. Steunenberg, assuring him of a market at a fixed price, it was perfectly natural that he should desire to acquire from the entrymen all the claims that he could at a price upon which he could make a profit. It was natural that Messrs. Wells and Downs, who had expended time and money in cruising and estimating the lands in question, should desire to be paid by means of locating fees for the information they had acquired, and it would be perfectly natural for the people of Boise, living within fifty miles of a body of timber, much of which had been open to entry for years, without having attracted the attention of anyone, to be willing and anxious to secure for themselves a portion of this tract when it became known that buyers were in the market at a price which

would afford them a substantial profit. And with all these interests, moved by a similar purpose and actuated by a similar desire, namely, to make a profit by entering, locating, buying, selling and manufacturing the timber on the lands in question, it was the natural, and, in fact, the inevitable result that the only firm of locators, who had prepared themselves to serve the public, should locate the proposed entrymen; that the only dealer in timber lands in the City of Boise should buy them from the entrymen, and that the only company owning a manufacturing plant tributary to the timber in question should ultimately buy them from or through such dealer.

Again, this case differs from any reported in the books, because of the character of the people who made the entries. They were not imported for that purpose, and in not a single instance were they employed by the defendant company, or anyone acting for it. They comprised all classes of citizens residing in Boise and vicinity. The entry of timber lands became a society fad, resulting in men taking their wives and friends to the timber for an outing, and while there to exercise their right as citizens under the Timber and Stone Act. The record shows that the entries involved in this action were made by laboring men, farmers, merchants, bankers, lawyers, doctors, preachers, tailors, commercial travelers, miners, dentists, florists, civil and mining engineers, manufacturers, state officials, county officials, city officials, liverymen, hotel keepers and capitalists, together, in many instances, with their wives and daughters. Every one of these entrymen and entrywomen, in pos-

itive and unequivocal language, has testified as a witness for the Government in this case, that the inference, sought to be drawn from the fact that the lands were located by Wells and Downs and sold to Kinkaid indicates that he was acting in making that entry for someone other than himself, is an erroneous one.

We submit that in view of these facts the "badge of fraud" above referred to ceases to have any significance whatever.

(c) That Patrick Downs, the locator, selected for the entrymen the lands they entered.

As that is exactly what Mr. Downs was employed to do, its significance is not apparent, but we assume that those not conversant with timber lands entertain the thought that a prospective purchaser of such land, like a prospective purchaser of a farm, would prefer to make his own selection. The record, however, abounds with evidence that one timber claim was as good as another, so long as they appeared to well timbered, and that the entrymen in each instance left it to the skill and honesty of Mr. Downs to select for them lands of this character.

(d) That complainant's witness Hosely thought when he testified in the Borah trial that Mr. Barber gave him a book in Eau Claire, Wisconsin, on September 12th, 1903, purporting to contain plats of lands owned

by the company in "6-4," which lands were not then open to entry, but which the company afterwards acquired.

Senator W. E. Borah was indicted, together with Messrs. Barber and Moon, for the same conspiracy charged in the bill in this action. Senator Borah was granted a separate trial, and on that trial one Hosely, formerly employed by the defendant company as superintendent of its logging operations, produced what is commonly known as a plat book used by cruisers and estimators. Each page contained a diagram of a township of land. In the book produced by Mr. Hosely at the Borah trial certain sections were marked with red ink marks, and this was true as to township 6, range 4. Many quarter sections in this township were indicated by red ink marks when Mr. Hosely produced the book in court. Its importance grew out of Mr. Hosely's evidence, to the effect that this book was presented to him by Mr. Barber at Eau Claire, Wisconsin, on September 12th, 1903, which was three days before township 6, range 4, was open to entry by the public; and that at the time he received the book the red ink marks on the plat of township 6, range 4, were in it, thus conveying the impression that Mr. Barber knew in advance the lands which Downs was going to and subsequently did locate entrymen upon. In that view of the evidence, it certainly was a circumstance tending to connect the location work of Mr. Downs with the Barber Lumber Company.

In the Borah trial the Senator preferred to have the

case go to the jury without cross-examination, without evidence in his behalf, and without argument, and that was done. As a result, Mr. Hosely was not cross-examined.

On the trial of this action, Mr. Hosely again presented the famous plat book with the red ink marks in township 6, range 4. His former evidence was to the effect that he thought all of the red ink marks then in the book were in there when Mr. Barber gave it to him. When his attention was called to the fact that this book indicated by the same red ink marks the lands which he acquired November 4th, 1903, and which he conveyed to the Barber Lumber Company on December 15th, 1906, he was inclined to think that he was mistaken in his former evidence (2743). And when it appeared beyond all question that many townships in the book contained red ink marks, indicating lands owned by the company, which lands were acquired by the use of scrip selected by Mr. Hosely himself, after he arrived in Boise on September 21st, 1903 (2787-2792), it was evident to him that he was mistaken in his former evidence, as to the red ink marks in 6-4 being in the book when it was delivered to him, and he so testified.

Such is the evidence and all the evidence on the part of the Government upon which this so-called "hodge of fraud" is based. It amounts to nothing but a statement of a witness called by the Government, to the effect that he was mistaken in his former evidence, and that he does not think this plat of 6-4 was marked when Mr. Barber gave him the book.

On the other hand, the evidence on the part of the

defendant overwhelmingly establishes the fact that Mr. Hosely is mistaken entirely as to the book having been delivered to him at Eau Claire, or that the red ink marks on township 6, range 4, were placed in it by Mr. Barber at all.

L. G. Chapman testified with reference to this plat book that the markings on many of the pages and the red check marks in 8-7, 8-8, 6-9, and the plat of township 7-9, were made by himself; that he believes that the red marks in township 6, range 4, were made by him (3991-3993).

Mr. Barber testified emphatically that the red ink marks on 6-4 were not made by him (4537); that Mr. Hosely was mistaken in saying he delivered him the plat book; that he didn't think he ever had the plat book; that he didn't know at that time what lands were going to be open in that town for entry under the Timber and Stone Act, and did not know at that time what lands the State of Idaho would select (4540).

Mr. Moon testified and identified a letter written by him to Frank Steunenberg September 3rd, 1903, in which he said: "I enclose herewith a plat book in which I marked the lands covered by the deeds which we have. Will you please go over these, and add such lands as we have acquired since I forwarded the deeds to you, bringing it up to date? Shall probably send Mr. Hosely out there in a short time, to look over land in the Crooked River country, with the idea of putting in some logs this winter. We wish that you would let him have this book, so that he can tell on what lands to log. We are

figuring on buying some unlimited forest reserve scrip, which, as we understand it, is applicable to unsurveyed lands" (4545).

Mr. Moon also testified that the plat book in evidence was the one referred to in the letter, and was sent by him to Steunenberg for delivery to Hosely on September 3rd, 1903 (4546).

It thus appears that Mr. Hosely was entirely mistaken as to the manner in which he received the book, and in his first impression that the red ink marks were in it on September 12th, 1903.

(e) That the defendant reimbursed Steunenberg for two hundred dollars which Campbell, on November 15th, 1902, presented to Sharp, Senator Foster's protegee, as a contribution to Senator Foster's campaign fund, and for four hundred dollars which Steunenberg claimed to have paid to one G. M. Parsons.

Under Police Gazette headlines of "Attempt on the Special Agent," counsel, at pages 97 to 123 of their brief, have collated and referred to many isolated extracts from the mass of incompetent hearsay injected into this record, for the evident purpose of befogging the real issue. They do not hesitate to insinuate, if not openly charge, criminal dishonesty and bribery on the part of not only Mr. Barber, Mr. Moon and Ex-Governor Steunenberg, but upon the part of United States Senators Dubois, Spooner, Allison, Clapp and Foster, as well as on the part of their witnesses Sharp and Campbell.

This insinuating argument is based upon the erroneous assumption, which is ever present in the "departmental mind," that citizens never appeal to a Government official for an honest purpose.

It assumes that when Mr. Barber wrote Senator Spooner, advising him that final receipts were being held up in violation of the orders of the Department, and that, as he was assembling a tract of land in that vicinity, he would like to have the matter settled, "so that he could either scrip the lands in question or buy them" (p. 112, appellant's brief), that it was a request that Senator Spooner use some dishonest influence to have fraudulent titles approved.

It assumes that when Mr. Moon advised Steunenberg that "he had taken the matter of these suspended entries up by letter with three parties in Washington," he referred to Senators Spooner, Allison and Clapp, and that his attempt to find out through them as to whether or not valid titles could be procured by buying these suspended entries, conclusively indicates that the Senators were being asked to lend themselves to a fraud.

It assumes that complainant's witness, Senator Foster, testified falsely with reference to his conversation with Steunenberg and Sharp, to the effect that "Steunenberg never made any intimations that he wanted Sharp to do the wrong thing, or anything of the kind, and that his (Foster's) only purpose in talking to Sharp was to have him report on suspended entries, one way or the other; reporting adversely on all that he thought were bad and approving all that he thought were good (p. 3752).

It assumes that complainant's witness, Campbell, per-

jured himself when he testified that "Governor Steunenberg never requested him to ask Senator Foster to do anything wrong, and never suggested or intimated that he (Campbell) procured Mr. Sharp to do anything wrong, that Steunenberg was only asking him to find out what the trouble was, if anything, with twelve titles in the Boise Basin; that he (Campbell) was asked to do nothing but find out through Sharp and Foster what, if anything, was the matter with these claims; that when Sharp told him there were four or five claims which, in his opinion, were bad, he only requested Mr. Sharp to advise Governor Steunenberg of that fact and have them thrown out; that his (Campbell's) whole idea was to protect Governor Steunenberg from buying invalid claims; that he never asked Senator Foster or Mr. Sharp, or anyone else, to use their influence for the allowance of claims which were not properly entered;" and further assumes that Campbell's explanation of the reason he paid Sharp two hundred dollars, to the effect that Senator Foster, who was a candidate for re-election, had requested him to be liberal with Sharp in the matter of his expenses, because his father was a member of the Oregon Legislature and that the payment was a matter of politics, is wholly untrue (3874-3884).

It assumes that in some manner some of the patents involved in this action are fraudulent because Governor Steunenberg, and Mr. Barber at the request of Governor Steunenberg, tried to find out if it would be safe to purchase the twelve entries which were then under suspension, although the undisputed evidence shows that such twelve entries were afterwards canceled, and were never

acquired by the Barber Lumber Company, and not one of them is involved in this action.

This "Badge of Fraud" is based upon these wickedly false and unwarranted assumptions, which, in turn, are based upon grossly incompetent evidence, consisting of conversations between complainant's witnesses Foster and Campbell and plaintiff's witnesses Sharp and Campbell, and the ridiculous evidence of Garrett, the Receiver, with reference to Sharp's official conduct after his visit to Campbell, although the evidence is undisputed that not a single entry then suspended has ever gone to patent or final certificate, and that every suspended entry involved in this action had been approved by Sharp, as well as Garrett, prior to that visit. (See Classification.)

Although this entire narrative, entitled "The Attempt on the Special Agent," is wholly immaterial to the decision of the issues now on trial, because the entire transaction related to entries not involved, it is due to the gentlemen whose reputations and characters are assailed by insinuation and inuendo under the cover and protection of a judicial investigation, that a simple plain statement be made of the undisputed facts, from which it will appear, as the fact was, that Governor Steunenberg, in his efforts to acquire the necessary acreage provided by his contract of March 12th, 1902, was anxious to buy, and the entrymen were anxious to sell ten or twelve entries upon which final proof had been made and accepted and the purchase price paid to the Government, but upon which the land office at Boise refused to issue final certificates, notwithstanding the order of June 6th, 1902, requiring them to do so, although no adverse

reports were on file, and Governor Steunenberg did not know and could not find out what, if anything, was the matter with them. The whole evidence conclusively shows that his investigation was solely for the purpose of determining as to whether or not he could safely invest in these twelve entries, and as he was unable to find out, and the land office refused to issue certificates as long as Sharp was investigating their territory, an effort was made to have him report one way or the other, to the end that the local land office would comply with the order of June 6th, 1902, and issue final certificates, or else cancel the entries and enable the land to be procured by locating scrip upon it.

The simple facts, stated chronologically, are as follows:

On July 13th, 1901 (before any entries had been made in the Boise Basin), an order was made by the Commissioner of the General Land Office requiring local land office officials to withhold final certificates until all papers were approved at Washington (2975). This order was the result of the large number of T. & S. entries which were made along the Payette River in May, 1901, and which were being investigated by a representative of the Interior Department (2977). Pursuant to this order, all T. & S. filings in the Boise Basin were treated the same as the Payette entries, and final certificate held up pending approval of same (2979). All final proofs in the Boise Land Office submitted before June 6th, 1902, were received by the local land office, a receipt given for the moneys paid, and the whole matter referred to Washington for approval (2980). On

April 10th, 1902, the General Land Office advised the local land office officials to issue final certificates in a large number of such suspended entries, many of which are involved in this action (2982-2986). On April 22nd, 1902, the local land office officials were instructed to issue final certificates in the remaining suspended entries (2987-2991). Notwithstanding such instructions, local officials refused to issue certificates, assigning as a reason that they were not satisfied beyond question that the entries were regular, and asking for further instructions, and requesting that the entries be investigated in the field (2992-2995). Accordingly, Special Agent Louis L. Sharp appeared upon the scene in May, 1902. On June 6th, 1902, the local officials were again instructed by the Commissioner of the General Land Office to refer such entries as they had good and substantial reasons for suspecting to the Special Agent for early action, and to issue final certificates in all other cases (2998). Acting under the instructions of June 6th, 1902, the local land office issued final certificates on all entries which had then been made, except "ten or a dozen," upon which Sharp had requested final certificates be withheld. These were the so-called five "Anderson entries," John I. Wells, Jennie E. Wells, Mr. and Mrs. Granger and Oral Dye, which were all Mr. Garret could remember (2996). The only one of these entries involved in this action is that of Homer C. Granger, whose entry was suspended on December 12th, 1901, but was approved and final certificate issued on July 15th, 1902, long before the Sharp-Campbell incident occurred. (See Classification.) **It is an important fact**

that not a single entry involved in this action was pending and unverified when the so-called "Attempt on the Special Agent" was made. It all related to twelve entries which were not approved under the order of June 6th, 1902, and which never have been approved or gone to patent.

After the orders of April 10th and 22nd, and before the peremptory one of June 6th, E. J. Dockery and G. M. Parsons, two attorneys, representing entrymen, called at the land office for information as to why final certificates were not being issued in accordance with the Commissioner's orders. All information as to the reason for withholding them was refused (3001-3003).

Under the construction of the Timber and Stone Act, entertained by the Department at that time, an entryman, who, subsequent to his original filing, and before making final proof, sold, agreed to sell or mortgaged his lands, was guilty of fraud, and final certificate was refused him (3018).

At the time final proof was made, Mr. Garrett, as Receiver, and Mr. King, as Register, joined in a report in each of the 125 T. & S. entries so suspended, recommending that the entry be allowed (3023). Of the entire list of 125 entries so suspended, the Special Agent requested that final certificate be withheld in twelve cases (3026). The only ground for the suspicion entertained by the local land office was the lack of market for timber and lack of any considerable means by many of the people making entries (3029).

It will be remembered that Governor Steunenberg was under contract to acquire a stipulated acreage in the

Boise Basin, and that he expected to purchase the timber and stone claims which had been filed upon as soon as the same came into market. It was his understanding, and that of Mr. Kinkaid, who acted as purchasing agent, that they could not safely buy until final certificates had been issued. Under these conditions, the desire of Governor Steunenberg to have these suspended entries either passed upon and approved, and thus placed on the market, or else canceled, to the end that the claims might be acquired by scrip, as suggested in Mr. Barber's letter to Senator Spooner, is a perfectly natural one, and entirely consistent with the utmost good faith on his part; and every particle of the evidence offered by the Government confirms this view of the transaction.

Because Governor Steunenberg was allowed, as a credit on his account, the sum of \$200 he paid Campbell and \$400 paid Parsons, this court is asked to infer, first, that such payments were improper ones, and second, that the defendant knew of such improper use of the money, and participated in it. In this connection the following conceded facts become important:

Both Governor Steunenberg and Mr. Parsons are dead, and there is no evidence in the record showing what services Mr. Parsons rendered for the \$400 paid him.

With reference to the \$200 which Governor Steunenberg paid to Mr. Campbell, to reimburse him for moneys he claimed to have paid Sharp to cover the expense of his trip to Spokane: Mr. Sharp testified that after making two trips at Senator Foster's request, he wrote the Senator asking him to reimburse him for his expenses.

Senator Foster told him to see Mr. Campbell, and he would pay him. He thought his expenses were about \$75, and Campbell gave him \$100. That was the only money he received (1035-1037).

Mr. Campbell, on the other hand, insists that Senator Foster asked him to pay Sharp's expenses, and that he gave him \$200 in cash, and thereupon wrote to Governor Steunenberg, requesting him to remit that amount, and Governor Steunenberg paid it (\$270).

Both of these witnesses were called by the Government, and their evidence leaves a serious doubt as to whether Mr. Sharp was paid \$100, or \$200, but there is no question but what Governor Steunenberg was called upon and did pay to Mr. Campbell the sum of \$200, which Mr. Campbell represented was the expense Mr. Sharp had incurred in making the several trips to confer with Senator Foster. As Mr. Campbell testified, he allowed Mr. Sharp liberally for his expenses, as a contribution to the campaign fund of Senator Foster.

The important and undisputed fact, however, relative to these expenditures, is this: These items were first presented to the Barber Lumber Company by Governor Steunenberg in July, 1904, and were then allowed to the Governor as a credit exactly as charged, without investigation, and without the specific items being called to the attention of Mr. Barber or Mr. Moon, or anyone, except Mr. Cotton, their bookkeeper at Eau Claire (4617). The evidence is undisputed that, while Governor Steunenberg was acting on his own account and under his contract in the purchase of the original Basin

entries, he rendered no accounts of his expenditures, except to send in deeds as they were acquired. His first report of moneys received and expenditures made was under date of July 7th, 1903, and related solely to the purchase of timber in the Crooked River country (4600-4603). The next report was under date of October 1st, 1903, containing a mere statement of the moneys he had received from Palmer and the moneys he had paid for land in "Boise Basin" (4600). About July 1st, 1904, Governor Steunenberg came to Eau Claire for the purpose, among others, of rendering an account of his receipts and expenditures. At that time he dictated a continuation of his report of July 7th and a continuation of his report of October 5th to the stenographer of the North Western Lumber Company at Eau Claire (4606-4619). At that time he also presented a bill for his personal expenses, incurred between March, 1902, and January 1st, 1903, in which latter statement appears for the first time the items of \$400 paid to Parsons and of \$200 paid to Campbell (4610).

It appears from the undisputed evidence that Messrs. Barber and Moon, for months, had been trying to get a statement from Governor Steunenberg of his receipts and expenditures of moneys. When he finally appeared in July and rendered his statement, it was found that he had failed to account for about \$7,000 of the money he had received, and such indebtedness continued to the time of his death (4620). Under these circumstances, his account was audited by Mr. Cotton, and his bills allowed, including those for his personal expenses, exactly as he charged them, and all of such reports now

appear on the books of the Barber Lumber Company exactly as he made them. The fact that he reported first on the Crooked River expenditures accounts for the reverse order in which his receipts and expenditures appear on the books of the Barber Lumber Company.

(f) Refusal of defendant's manager, L. G. Chapman, to produce its books before the grand jury.

Mr. L. G. Chapman came from Wisconsin to Boise, Idaho, as Manager of the Barber Lumber Company in August, 1903, after all the lands in question had been acquired, except a few in "6-4" (2813). In April, 1907, he was subpoenaed to produce before a grand jury all the books of account, correspondence and papers of the Barber Lumber Company, and did so. The grand jury, however, desired to retain the custody of the books, and this he refused to permit (2951). Mr. Chapman testifies fully, at pages 2942 and 2956, as to why, on the advice of counsel, he refused to leave the books in the custody of the grand jury. It appears that the then district attorney, N. M. Ruick, was afterwards removed from office for fraudulent conduct in procuring indictment against Senator Borah, J. T. Barber, S. G. Moon and others, which indictment was quashed by Judge Whitson, of the District Court of Idaho, after a full hearing, because of such wrongful conduct. On the trial of this action all of the correspondence, books, vouchers, estimates and everything called for were produced.

In view of these facts Mr. Chapman's refusal to produce them before a grand jury, which he was advised and believed, was finding indictments against the officers of the Barber Lumber Company by the fraudulent procurement of the District Attorney, with a view of prejudicing the name of Governor Steunenberg in the minds of the jurors about to try Moyer and Haywood, who were charged with his murder, does not seem material in this case.

(g) That John I. Wells, prior to April 10th, 1902, advanced money to certain entrymen with which to make final proof.

The undisputed evidence establishes that John I. Wells never advanced a dollar of money to any entryman in behalf of Mr. Barber, Mr. Moon, the Barber Lumber Company, or anyone representing it. He advanced no money until after December 25th, 1902, prior to which time most of the Basin applications had been made. On that day he arranged with William Sweet to furnish money to entrymen who found themselves unable to make payment as the time for making their final proof approached. Until April 10th, 1902, neither Barber nor Moon, nor the defendant, were interested in any manner in Idaho timber lands, and at no time were represented, directly or indirectly, by John I. Wells. If the respective dates established by the undisputed evidence are kept in mind, the circumstance of Wells advancing money is entirely without significance,

even assuming, which is not the fact, that Wells' advancements in behalf of Sweet were made in violation of the law.

(h) That Taylor, a cruiser sent by defendant to report on the Crooked River timber, did not report promptly.

Under the heading of "Taylor Incident" and "Taylor Report," counsel devote thirty pages of their elaborate brief to an argument—that all the evidence of all the witnesses produced on behalf of complainant and defendant, together with all the correspondence and documentary evidence relating to the inception of the Crooked River purchases, constitutes a mass of perjury, because Taylor, who was employed in October, 1902, to cruise four townships in the Crooked River country, with a view of scripping the lands if they were found desirable, did not make a report until December 5th, 1903. Mr. Taylor was an exceptionally candid witness and intelligent man, being, at the time he testified, a member of the Idaho Legislature, and a perusal of his evidence will be sufficient to satisfy the court that such evidence and correspondence is not perjury or fabrication, and that the circumstance of Mr. Taylor's report being in writing, and dated December 5th, 1903, does not constitute grounds for an inference of fraud (p. 3968 to 3980). (See also No. 35, Leading facts.)

(i) That there exist minor discrepancies in the defense.

Under this heading counsel devote twenty-three pages of their brief. Many statements therein contained are manifestly false, such as the one at page 314, to the effect that since the finding of an indictment against him, Palmer has been a fugitive from justice in Canada. The undisputed evidence is to the effect that Mr. Palmer removed permanently to Canada in December, 1902, five years before this action was commenced, or an indictment found, has resided there ever since, and is now insane (4589-4592).

This entire portion of the brief strongly suggests the necessity of "grasping at straws." Among other "straws" which are urged upon this court as a reason for setting aside the 210 patents involved in this action, counsel mention the fact that a copy of a telegram in Mr. Moon's handwriting was found in the files of the company, which had never been folded and was not copied in the letterbook; that an important message from Mr. Moon to Mr. Palmer was directed to be repeated, but the repeated message cannot be found in the files; that one letter was copied in the tissue letter-book at page 661A, which page was numbered in ink; and finally, that out of more than thirteen hundred letters and telegrams which were stipulated to have been produced (4801), covering correspondence of the promoters of the Barber Lumber Company until its organization, and of that company from its organization to date, and embracing a period of substantially seven years to

the time of trial, a few tissue paper pages of the copy books were torn or otherwise rendered illegible, and (it is suggested) that such mutilation was done intentionally and purposely.

In view of this suggestion, now made for the first time, we wish to call the court's attention to the following facts, which appear of record:

During the taking of the depositions of Mr. J. T. Barber and Mr. S. G. Moon at Eau Claire, all of the books of account, vouchers and correspondence of the Company and of the deponents were produced, the defendant offering in evidence and reading into the record such of them as it deemed material. Counsel for the Government requested that letters and documents then offered in evidence be produced at the hearing of the case at Boise. Counsel for defendant stated that would not be done, unless an order of court required it, as they would be needed in criminal actions then pending against Messrs. Barber and Moon, whereupon counsel for the Government stated, "I don't know that I shall want them" (4826).

Before counsel for the Government began the cross-examination of these witnesses with reference to the correspondence, and to enable them to inspect and examine the same, a stipulation was entered into adjourning the examination from May 15th, 1910, to May 17th, 1910 (4699). During this period of three days all the books, correspondence, accounts and documents of the company were turned over to counsel for the Government, who were accompanied by an individual not connected with the case, and who

refused to disclose his connection or business, or to be sworn for that purpose (4761). No application was made for an order requiring the production of this original correspondence at the trial in the circuit court, but on the argument it was strenuously insisted that some of the correspondence had been fabricated, because of a certain letter found at page 4525, written by Governor Steunenberg, in which he says: "A local attorney here named Tipton (present Assistant U. S. Attorney) is at work among the entrymen, etc." This letter was dated February 3rd, 1903. On that date, Mr. Tipton was not Assistant U. S. Attorney, but was thereafter appointed to and held that position at the time of the trial of this case. This was urged upon the trial court as such evidence of fabrication that Judge Bean felt called upon to mention the circumstance in his opinion, and the refusal of the trial court to find such letter a fabrication was assigned as error (5714).

We have filed on this argument a stipulation, signed by counsel, together with the original letter above referred to, from which it appears that the words "present Assistant U. S. Attorney," consisted of a side remark made by counsel when reading the letter into the record, and by mistake incorporated into the minutes by the stenographer.

The other "straws," if investigated, will be found to be equally fragile.

(j) That deeds from the entrymen were taken in the names of Rand, Long and Palmer, and subsequently

conveyed to the company, and that in some instances second deeds were taken from the entrymen.

While this seems to have been abandoned in this court, it was urged with apparent sincerity in the court below as a conclusive "badge of fraud."

It appears from the Steunenberg contract of March 12th, 1902, that it was the ultimate intention to vest the title to this timber in a corporation, which was not then organized; that such corporation was not organized until July, 1902, and did not file its articles of incorporation in Idaho, so as to enable it to hold property in that state, until May, 1903.

Under leading fact No. 43, the evidence is referred to which explains why these deeds were taken in that manner. It will be noted that this practice was not confined to deeds from timber and stone entrymen, but that title to the 1,000 acres purchased for millsite and other purposes was also taken in the name of Mr. Rand, who was a stockholder in the company. An additional reason for not taking title to the lands in "6-4" directly to the Company was the fact that the Company was very anxious to negotiate for and purchase the lands in that township, which the State had selected, and it was believed that if it were known that the Company had already acquired a large amount in that township, they would be compelled to pay a higher price to the state (4659-4660).

The record abounds in satisfactory explanations for taking second deeds. In many instances, the first deeds taken cited a wrong consideration; in others, the wives

had failed to join; in others, the descriptions were wrong, and in some instances they were taken at the request of the entrymen themselves (4306; 4491; 4497-4501).

On the Legal Propositions Involved.

I.

The complainant must recover, if at all, upon the specific allegations contained in the bill. This being a civil action, the gravamen is not the conspiracy, but the damage or trespass. The material allegations of the bill, controverted by the answer and thus presented to this court for determination, are not what the defendant undertook to do, or agreed to do, or conspired to do, but what it, in fact, did, with reference to inducing, soliciting and procuring the particular entrymen named in the bill to make his or her specific entry. The allegations of conspiracy are superfluous and unnecessary, injected for the purpose only of making admissible a large amount of evidence which, without such allegations, would be incompetent.

This is not an action to enforce the penalty provided by the Timber and Stone Act, which provides that "if an entryman testify falsely, he shall forfeit the purchase price paid to the government, and any title so acquired by him shall be void, except in the hands of an innocent purchaser." In such an action the entrymen must be parties, and the right to recover is based upon the wrongdoing of the entrymen. This bill is not based upon the

wrong of the entrymen, but the wrong of this particular defendant, and this court is asked under its general equity powers to set aside a conveyance procured by fraud. In such a case the bill must show in detail in what the fraud consists and how it was effected, and the court can grant relief only when the allegations relied on are sustained by the evidence, and the burden of proving the fraud as alleged is on the complainant.

Southall v. Farish, 85 Va. 403; 7 S. E. 534; 1 L. R. A. 641.

Kents, Admr. v. Kents Admr., 82 Va. 205.

Lewis Pub. Co. v. Wyman, 168 Fed. 756.

Voorhees v. Bonesteel, 83 U. S. 16 and cases cited.

II.

This bill alleges that each of the two hundred and ten entrymen testified falsely at the time of making his or her original application to purchase, and again at the time of tendering final proof, and were solicited, induced and procured so to do by this defendant; and that all of the alleged illegal acts of the entrymen were, in fact, the illegal acts of this defendant, for whom they were acting in making their several entries. If these allegations are not sustained, this bill was properly dismissed. In determining this question, the following well-established rule, announced and reiterated by our Supreme Court, must be constantly borne in mind:

“The burden of proving fraud in issuing patents is on the government, and relief will only be granted when the specific allegations relied on are established by clear, unequivocal and convincing evidence, and not upon a

bare preponderance of evidence, which leaves the issue in doubt."

Colorado Coal Co. v. U. S., 123 U. S. 307.

U. S. v. Maxwell Land Co., 122 U. S. 365.

U. S. v. Budd, 144 U. S. 154. S. C., 43 Fed. 630.

U. S. v. Stinson, 197 U. S. 200.

U. S. v. Clark, 200 U. S. 601.

III.

A conspiracy to defraud means a common purpose, supported by concerted action; that each has the intent to do it; that it is common to each of them; and that each understands that the other has that purpose.

Ballentine v. Cummings, 7 At. 546.

Evans v. People, 90 Ill. 384.

State v. King, 104 Ia. 727.

U. S. v. Nunemacher, 7 Biss. 11.

Commonwealth v. Rogers, 181 Mass. 184.

People v. Gosling, 71 N. Y. 62.

U. S. v. Barrett, 65 Fed. 62.

IV.

To constitute an invalid agreement between an entryman and another, the minds of the entryman and such other must have met definitely and understandingly, so that there is a mutual consent, that when the applicant acquired title to the lands from the United States it would inure to the benefit of the other for a consideration.

U. S. v. Richards, 149 Fed. 443.

32 Cyc. 1077.

V.

An agreement on the part of an entryman to sell the land he acquires under the Timber and Stone Act, to be invalid, must have been entered into at or prior to the time the entryman made his original application to purchase. The right to sell or mortgage after filing the original application to purchase in good faith is settled beyond question.

U. S. v. Budd, 144 U. S. 154.

Adams v. Church, 193 U. S. 510.

U. S. v. Williamson, 207 U. S. 425.

U. S. v. Biggs, 211 U. S. 507.

VI.

The fact that a person advances money to an entryman to pay his entry fee and to make improvements on the land is not, in itself, unlawful, and can only be considered as a circumstance in determining whether or not there was an unlawful agreement with the entryman pursuant to which such advancement was made.

U. S. v. Richards, 149 Fed. 443.

U. S. v. Budd, 144 U. S. 154.

VII.

Fraud in making entries may not be inferred from the fact that a large number of entries had been solicited and located by one person if the entries themselves are legal.

U. S. v. Richards, 149 Fed. 443.

U. S. v. Budd, 144 U. S. 154.

U. S. v. Clark, 200 U. S. 601.

VIII.

Agreements of the character under which the two entries in Class D were made, between the entryman and one Humphrey, by which Humphrey was to advance the money, and the profits made divided, have been held not to invalidate the entry.

Hafemann v. Gross, 199 U. S. 347.

IX.

This case stands exactly the same as though the defendant had purchased from the entrymen, after patents issued, for patents when issued, relate back to the inception of the right of the patentee.

32 Cyc. 1037, and cases.

U. S. v. Clark, 200 U. S. 601.

U. S. v. Detroit Lumber Co., 200 U. S. 321.

X.

Conceding for the purpose of argument that the patents in question could be set aside for the wrong-doing of the entrymen, without making them parties, and without proper allegations for that purpose; and further conceding, for a like purpose, that the evidence in this case established wrong-doing on the part of the entrymen, still such patents cannot be set aside as against this defendant, who under all of the authorities, must be held to be an innocent purchaser.

U. S. v. Stinson, 197 U. S. 200.

U. S. v. Clark, 200 U. S. 601.

U. S. v. Detroit Lumber Co., 200 U. S. 321.

Smelting Co. v. Kemp, 104 U. S. 640.

XI.

Patents having been issued to all the lands in question, thereby conveying the legal title, nothing short of actual notice of fraud (assuming that fraud existed), is sufficient to deny defendant the protection the law affords an innocent purchaser.

U. S. v. Clark, 200 U. S. 601.

XII.

The complainant cannot be heard to say that the entrymen sworn in its behalf to support the allegations of the bill are unworthy of belief, and cannot ask this court to disregard their evidence without violating the rule established by all the authorities.

Dravo v. Fabel, 25 Fed. 116.

Dravo v. Fabel, 132 U. S. 170.

Smith v. Life Ins. Society, 65 Fed. 765.

U. S. v. Clark, 125 Fed. 774.

U. S. v. Clark, 138 Fed. 294.

Epremiar v. Ward, 169 Fed. 696.

XIII.

A patent duly issued by the United States raises a presumption that all preceding steps required by law have been properly observed and taken.

U. S. v. Stinson, 197 U. S. 204.

U. S. v. Des Moines Co., 142 U. S. 510.

Col. Coal Co. v. U. S., 123 U. S. 307.

U. S. v. Detroit Lbr. Co., 131 Fed. 668.

Smelting Co. v. Kemp, 104 U. S. 640.

XIV.

Assuming that the original Basin entries were fraudulently made, and that Governor Steunenberg had knowledge of the fraud, such knowledge cannot be imputed to Mr. Barber, Mr. Moon, or the defendant Company. Those lands were purchased by Mr. Barber and Mr. Moon, under contract with Governor Steunenberg, whereby he guaranteed the titles to be legal and valid. His interests were adverse to theirs, both as vendor and guarantor. So far as those entries were concerned, he was not even acting as their agent.

Clark and Marshall on Corporations, Vol. 3, Sec. 723.

Louisville Trust Co. v. Louisville & C. R. Co., 22 C. C. A. 378.

Whittle v. Vanderbilt Co., 83 Fed. 48.

Davis Wagon Wheel Co. v. Davis Wagon Co., 20 Fed. 699.

Thompson on Corporations, Secs. 5205 and 5207.

XV.

The mass of evidence found in the record relative to the evidence of the entrymen at the time of tendering their final proof, and relative to the entry of lands not involved in this action, was clearly incompetent, and should be disregarded—

U. S. v. Williamson, 207 U. S. 425.

U. S. v. Budd, 144 U. S. 154.

XVI.

The patents in question cannot be set aside or invali-

dated because the defendant desired to acquire, and did acquire, more than one hundred and sixty acres of land which had been entered under the Timber and Stone Act, unless and until it is conclusively shown that the entries upon which they are based were made by entrymen who, at the time of their original filing, were acting as agents of the defendant, as alleged in the bill. It was not unlawful for the defendant to acquire the lands in question from the entrymen, or to employ agents and provide funds for such purpose.

U. S. v. Budd, 144 U. S. 154.

U. S. v. Biggs, 211 U. S. 507.

Pages 363 to 396, appellant's brief, are devoted to an argument, the substance of which is stated at page 365 as follows:

"Independently of any unlawfulness in the instrumentalities employed in the execution of the Steunenberg contract, that contract constituted a conspiracy because it embodied an agreement of three persons to accomplish, by concerted action, an unlawful purpose, the collection into one hand of a large body of public lands by means of the law and in fraud of the law."

This argument is obviously unsound, both as a matter of fact and as a matter of law.

As a matter of fact, the Steunenberg contract, as well as the evidence of Messrs. Barber and Moon, clearly shows that the only lands contemplated to be acquired by Timber and Stone entries, were the 6,400 acres which Governor Stuenenberg represented he already had

purchased, and the 5,000 acres which had then been filed upon, and which he felt confident he could acquire after final proof was made. The balance of the 25,000 acres was to be acquired by scrip.

As a matter of law, this contention of counsel was disposed of in the case of *U. S. v. Biggs*, 211 U. S. 507, where the same argument was made. Judge White, speaking for the court, said, after discussing the cases of *U. S. v. Williamson* and *Adams v. Church*, and the right of the entryman to sell at any time after his original application to purchase was filed:

"It is insisted by the Government that, however conclusive may be this ruling as to the power of the applicant to sell after application, and to perfect his entry for the purpose of enabling him to perform such contract, such ruling does not conclude the contention that a conspiracy formed to induce an entryman who has made his application to purchase, subsequently to agree to convey his interest in the land would be a violation of the statute. But we are constrained to say that this is a mere distinction without a difference. The effect of the ruling in the *Williamson* case was to hold that the prohibition of the statute only applied to the period of original application, and ceased to restrain the power of the entryman to sell to another and perfect his entry for the purpose of transferring the title after patent. This being concluded by the decision in the *Williamson* case, the distinction now

sought to be made comes to this, that it is unlawful, under the statute, to conspire to have that done which the statute did not prohibit, and on the contrary, by implication, recognized could be lawfully done without prejudice or injury to the United States in any manner."

In *United States v. Budd*, 144 U. S. 154, the right of any person to acquire by purchase more than one hundred and sixty acres of land purchased from the government by various entrymen under the Timber and Stone Act, is clearly recognized and established. In discussing the evidence, Judge Brewer said:

"It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase it. This is perfectly legitimate, and implies or suggests no wrong. The Act does not, in any respect, limit the dominion which the purchaser has over the land after it is purchased from the government, or restrict, in the slightest, his power of alienation. All that it denounces is a prior agreement—the acting for another in the purchase. * * * Montgomery might rightfully go or send into that vicinity, or make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that fact might rightfully go to the land office and make applica-

tion and purchase a timber tract from the government."

Cases Relied Upon by Appellant.

U. S. v. Trinidad Coal Company, 137 U. S. 160. This case is urged as authority to the proposition that it is unlawful for one person or corporation to assemble a tract of more than one hundred and sixty acres of timber and stone lands, irrespective of the question as to whether or not the entries were made by the entrymen for their own use, and in their own behalf, or made in behalf of the person or firm assembling the tract. The case is not authority for such a proposition. It was before the Supreme Court on general demurrer and the question presented was as to whether or not the bill of complaint stated facts sufficient to entitle complainant to equitable relief. After alleging that seven employees and officers of the defendant corporation entered into an agreement to obtain lands in excess of the coal land act, by each filing nominally for himself, but in reality for the company, the complaint alleged:

"It also appeared from the bill that the entrymen did not enter the lands for their own use and benefit, nor for the use and benefit of any of them, but for the direct use and benefit of the Trinidad Coal Company; that its officers procured the entrymen to go in a body to the City of Pueblo to file the above papers as stated; that the papers and affidavits were

drawn and prepared by its officers, that the expense of the conspirators in going to that city to make the entries was paid by its officers acting for it and in its behalf; that the entire purchase money for all the tracts and all land office fees, costs and expenses were paid by the company, etc."

On this state of facts, the court held that the demurrer to the bill was properly overruled, putting their decision squarely upon the ground that it appeared from the bill that the entrymen were mere agents of the defendant corporation.

It was not acquiring more than three hundred and twenty acres from honest entrymen that the court held to be illegal, but using dummies or agents to make the entries, thus doing indirectly what could not have been done directly, which constituted the fraud.

U. S. v. Keitel, 241 U. S. 370. This case is relied upon to support the same proposition. In this case the Attorney General made an elaborate argument, attempting to distinguish between "the right of acquisition" and "the right of alienation," making the argument here presented, that an honest entryman had the undoubted right to sell as soon as his original application to purchase had been filed; but that the statute limited the right of any person or corporation to acquire more than one hundred and sixty acres under the Timber and Stone Act, and that any plan or course of action, having for its object the acquiring of more than that acreage, constituted a fraud.

This case was also presented on a general demurrer

to an indictment charging conspiracy to defraud. The whole decision is made to turn upon the allegation that the entries in question were made by agents of a corporation and in its behalf, and that an indictment charging such fact stated an offense.

RECAPITULATION.

Notwithstanding the voluminous record presented on this appeal, the issue involved is a narrow one, namely: "Were the entrymen and entrywomen, who made the entries in question, acting at the time as agents and in behalf of the defendant company?"

There is no conflict in the evidence on this question. Complainant offered in evidence the land office records, including patents to all of the lands involved. These patents, in and of themselves, are presumptive evidence of the regularity of all prior proceedings, and this presumption was made conclusive when each entryman testified that his or her entry was made in strict accordance with the statute. This was the state of the evidence when plaintiff rested, without having made a semblance of a *prima facie* case. The evidence of the defendant only corroborates the evidence of complainant by showing that what the entrymen testified to was true and could not have been otherwise. This was demonstrated as to the "Basin" lands by showing that such Basin entries had been entered and final proof made before this defendant, or its incorporators, became interested. As to the "Crooked River" lands and "6-4"

lands, it was demonstrated beyond question that the timber and stone entries were made for the express purpose of preventing defendant from acquiring these tracts by the use of scrip. The evidence of the defendant shows the dates when it furnished money to purchase each of the several tracts, and in each case it was after final receipt had been issued. Its correspondence shows more conclusively than oral evidence the history of this entire transaction, and the allegations of the bill are disproven by such history.

Applying the rule that the evidence upon which patents are set aside "must be clear, unequivocal and convincing," to the record here presented, and it follows: that this court will not set aside the patents issued on the 110 entries mentioned in Class A, every one of which entrymen paid all his preliminary expense, location fee and purchase price of the land, and secured his final certificate, without borrowing or negotiating with any of the alleged conspirators; or the 19 Basin entries mentioned in Class B, every one of which was filed upon during the year 1901, and in which final proofs were made and the Government paid for its land prior to April 10th, 1902, when Messrs. Barber and Moon first became interested; or the 9 entries mentioned in Class C, in view of the undisputed evidence of the entrymen that they were acting solely for themselves, and that they never knew or heard of the Barber Lumber Company, Barber, Moon, Steunenberg or anyone representing them in the transaction; or the 2 entries embraced in Class D, on the undisputed evidence of complainant that the necessary money was furnished by one

Humphrey, who is not charged or alleged to have been an agent of, or co-conspirator with the defendant; or the 64 entries embraced in Class E, relative to which there is absolutely no evidence offered, except the land office records, admitted by stipulation, including the patent, which, of itself, is presumptive evidence of regularity; or the 6 entries embraced in Class F, relative to which there is neither evidence, stipulation or anything else found in the record, except the allegations of the bills, and that the judgment and decree appealed from should be affirmed.

Respectfully submitted,

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Cooper, Jeanette B.....	1304	1315		
Coleman, William R.....	2369	2391	2400	2404
Clyne, Harry L.....	2498	2508		
Chapman, L. G.....	2813			
(Resumed)	2877			
(Resumed)	2924	2957	2960	2960
(Recalled)	3275	3282	3282	
Campbell, A. B.....	3848	3873	3882	
Davidson, William B.....	2146	2156		
Dille, Lewis S.....	3318	3330		
Ellis, Geo. T.....	718	736		
Eagleson, Harry K.....	998	1011	1019	
Eagleson, Helen E.....	1056	1062		
Eagleson, Chas. H.....	1732	1746		
Eagleson, Benj. C.....	1748	1759	1763	1766
R.R.D. 1767; R.R.C. 1767.				

Eagleson, Geo. G.....	2342	2354	2358
Eagleson, Mary J.....	2358	2367	
Eagleson, M. Laeta.....	2546	2561	
Eagleson, Viola S.....	2575	2584	
Ewing, Clara B.....	2001	2020	
Ellis, Alexander T.....	2405	2422	
Ewing, Albert B.	3451	3459	
Ehrmantraut, Margaret ...	3885	3891	
Ehrmantraut, Joseph	3893	3904	
Folsom, Lewis L.....	949	967	
Faraday, Charles B.....	2234	2249	
Foster, A. G.....	3739	3750	3753 3753
Greig, Samuel	362	375	
Greig, Sarah	384	389	
Gillum, Mack	406	417	427 427
Gibberd, W. H.....	476	487	
Gibberd, Addie G.....	489	498	
Gibson, George G.....	555	565	
Granger, Homer G.....	1434	1447	1453
Gary, John R.....	1672	1689	1692
Gregory, Alice	1819	1833	
Gardner, Elma E.	2042	2051	
Garrett, Edw. E.....	2961	3013	3047 3059
R.R.D. 3062; R.R.C. 3062.			
(Recalled)	3213	3214	3221 3221
(Recalled)		3244	3250 3251
R. R. D. 3251.			
(Recalled)	3334	3369	
Hollister, Jos. M.....	614	623	
Hollister, Leonora	637	640	
Harrison, Walter L.....	759	774	782 790

Hobbs, John E.	1331	1343	1382
Hanson, Andrew	1497	1515	
Hoover, Sedgwick	1529	1558	1568 1573
Hart, Irving W.	1710	1724	1726 1727
Hart, Fannie R.	1728	1731	
Harbaugh, Rice J.	2178	2219	2229
R.R.D. 2792; R.R.C. 2794.			
Hoseley, Gus D.	2730	2760	2764 2769
R.R.D. 2769; R.R.C. 2785.			
Humphrey, Wm. H.	3495	3502	3527 3535
R.R.D. 3546; R.R.C. 3548.			
Humphrey, Henry	3549	3559	3563 3563
Hughes, John F.	3962	3964	
Hodgin, Shadrach L.	3267	3272	
Haines, John M.	3273	3274	
James, Henry T.	601	609	
Joplin, Sanora A.	1226	1237	
Joplin, Walter	1239	1249	1252
Joplin, Andrew F.	1890	1956	
Keane, John J.	532	547	
Kingsley, Charles S.	682	697	698
Kingsley, Caro F. B.	698		
Kempner, Annie E.	1324	1330	
Kinert, Lorin T.	2160	2173	2177
Koelsch, Charles F.	2901		
Lane, Willis C.	640	650	653
Link, Gustave A.	1136	1145	1149
Von Deyn, Wm. F.	3949	3961	
Link, Mary	1153	1157	
Lockhart, Edward A.	1836	1847	
Long, Geo. S.	3416	3425	

Lane, Frank	3754	3769		
McDonald, John G.....	934	948		
Morrison, John T.....	1101	1109		
(Recalled)	1162			
Martin, William H.....	1416	1426		
Martin, Henrietta B.....	1428	1432		
Martin, Bertha,	1768	1779	1782	1782
Martin, Wheeler H.....	2252	2278	2282	
Martin, Frank R.....	2469	2482		
(Recalled)	3140	3154	3167	3172
R. R. D. 3174.				
Martin, Thomas L.	2482	2496		
Martin, Mary J.....	3089	3099		
Monroe, Mary A.....	1695	1708		
McDonald, Frank R.....	2053	2064		
McClain, C. W.....	3374	3377		
Meholin, M. P.....	3131	3132		
Macartney, A. E.....	3966	3966		
McAfee, Robt. F.....	3127	3130		
(Recalled)	3177	3177	3194	
Nibler, Lewis	312	323	335	340
R. R. D. 349.				
Nusbaum, Pearl I.....	851	858	861	
Neil, J. M.....	357			
Nugent, Albert B.....	2634	2664	2711	2715
Noble, Harry B.....	3430	3444		
Ownbey, Jackson	1183	1200		
Ownbey, Mary E.....	1202	1211		
O'Farrell, Evelyn	2021	2036	2040	2040
R. R. D. 2041.				
Ownbey, Aaron	3828	3844	3845	3846

Pearson, Margaret	628	637		
Pearson, William	653	673		
Phelps, Edward J.....	976	986		
Patterson, Charley	986	997		
Parker, Bert T.....	2080	2093	2094	
Penrod, Joseph	2429	2439		
Poncia, C. R.....	2905	2912	2915	
Phelps, Eleanor A.....	3101	3109		
Ross, W. A.....	2286	2312	2322	
Ross, Josie M.....	2329	2341		
Reeves, Wilbert R.....	2441	2454		
Richardson, A. L.....	2545	2545		
Sensenig, Emerson S.....	737	750		
Sensenig, Lucretia C.....	751	757		
Starn, Edward H.....	791			
Starn, Mary	819	823		
Schmelzel, Elizabeth	808	816		
Stahl, Arietta H.....	824	829		
Stahl, Benj. E.....	831	839		
Sharp, Louis L.....	1022			
(Recalled)	1118			
Sullivan, Joseph	1455	1472	1476	1477
Scully, Margaret	2526	2541		
Simpson, Leon S.....	3073	3088		
Stephenson, Lettie L.....	3648	3657	3673	
Stephenson, Martin S.....	3675	3692	3720	3736
Snow, Henry A.....	3906	3925	3942	
Snow, William F.....	3938	3944		
Thurman, Lola T.....	700	707	711	715
Thornton, Dennie	1400	1412		
Thompson, Mary	1478	1494	1496	

Thompson, Thos. S.....	1519	1525		
Thompson, Jennie E.....	1617	1626		
Twogood, Merritt L.....	2095	2110		
Twogood, Ida	2139	2145		
Taylor, Max P.....	3230	3242		
Vance, Samuel E.....	1784	1793		
West, Dean	200	210		
(Recalled)		311	311	312
West, Louisa B.....	219	225		
Worthman, Harry S.....	429	460	473	
Weasel, Frank P.....	1252	1261		
Wilmot, Ery A.....	1262	1284	1295	
Wade, W. E.	1577	1579	1590	1592
R. R. D. 1592.				
Walker, W. S.	1987	1998		
Wills, William J.....	2068	2073	2079	2079
Woodburn, J. K.....	2112	2128	2133	
Wickersham, Cleora M.....	2456	2467		
Wheeler, Geo. P.....	2563	2566		
Weston, Nettie	3064	3071	3072	
Wright, Junius.. ..	3564	3576		
Youngkin, John A.....	870	889		
Youngkin, Susie A.....	968	975		
Young, Norman H.....	1629	1655	1661	
Zapp, Mathias A.....	2796	2804	2808	2809
R.R.D. 2810; R.R.C 2812.				

DÉFENDANTS' WITNESSES.

Barber, Jas. T.....	4356		
(Recalled)	4478		
(Recalled)	4560		
(Recalled)	4593		
(Recalled)	4641		
(Recalled)		4701	
(Recalled)		4782	
(Recalled)		4786	
(Recalled)		4789	
(Recalled)		4796	
(Recalled)		4807	
(Recalled)		4811	
(Recalled)			4827
Blake, John J.....	4034	4039	
Chapman, L. G.....	3989	3997	4005
Cosgrove, P. J.	4589	4592	
Cotten, F. H. L.....	4676	4688	
(Recalled)	4766		
Downs, P. H.....	4007	4023	
Hughes, J. M.....	3962		
Kinkaid, Jno.	4219		
(Recalled)	4307	4329	

Moon, S. G.	4410			
(Recalled)	4544			
(Recalled)	4598			
(Recalled)	4666			
(Recalled)	4701			
(Recalled)		4756		
(Recalled)		4779		
(Recalled)		4783		
(Recalled)		4788		
(Recalled)		4790		
(Recalled)		4802		
(Recalled)		4810		
Macartney, A. E.....	3966	3966		
Pritchard, L. M.....	4185	4203	4213	4215
R. R. D. 4217.				
Taylor, Wm. H.....	3968	3975		
Watson, Jno.	4046	4047	4065	4066
Wells, Jno. I.....	4070	4132	4168	4182
R.R.D. 4183; R.R.C. 4184.				
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